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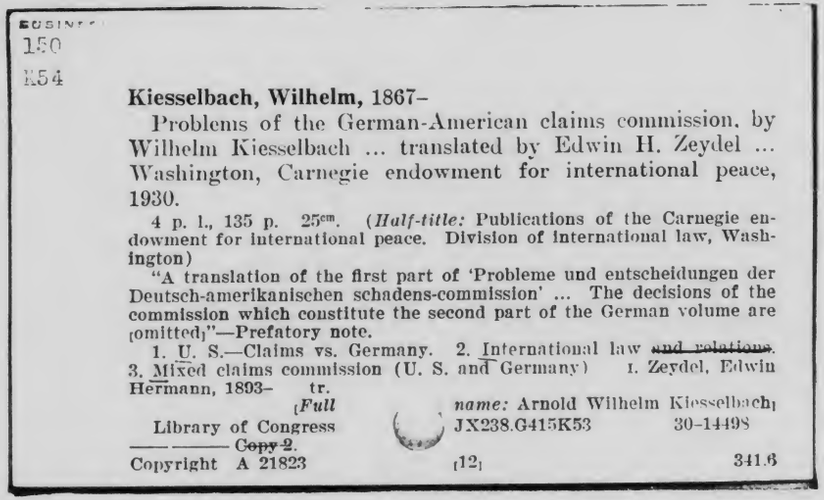

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PROBLEMS

OF THE

GERMAN-AMERICAN CLAIMS

COMMISSION

BY

WILHELM KIESSELBACH, Dr. jur.
Attorney in Hamburg
Commissioner of the Reich in Washington

TRANSLATED BY

EDWIN H. ZEYDEL
Professor of German, University of Cincinnati

WASHINGTON
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PREFATORY NOTE

The present volume is a translation of the first part of "Probleme und Entscheidungen der Deutsch-Amerikanischen Schadens-Commission" (Problems and Decisions of the German-American Mixed Claims Commission), which was published in 1927 in Mannheim, Germany, from the pen of Dr. Wilhelm Kiesselbach, the German member of the Commission. The decisions of the Commission which constitute the second part of the German volume are accessible in their original language to American and English readers in *Mixed Claims Commission* (*United States and Germany*), *Administrative Decisions and Opinions of a General Nature and Opinions in Individual Lusitania Claims and other Cases* (Washington, Government Printing Office), and the citations in this volume are to that text.

Judge Kiesselbach's discussion of the problems of the Commission is very valuable not only for the German readers for whom it was written, but also for American readers by reason of its presentation of a carefully reasoned German estimate of the Commission's labors and of the American point of view. His faith in the upright spirit of the eminent umpire, the late Judge Edwin B. Parker, a Trustee of the Carnegie Endowment for International Peace, "who was constantly animated by a meticulous striving for impartiality," was never shaken by the disappointments which "awaited the Germans, whose representatives were called upon to defend the rights of a vanquished people in a foreign atmosphere and against foreign conceptions of law."

The Carnegie Endowment for International Peace regards it as a privilege to lay before the reading public of the United States an example of the way in which arbitration in time of peace, through arbiters pervaded with the spirit of fairness, very satisfactorily adjusts the damages of war in accordance with the principles of justice.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.,
January 20, 1930.

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INTRODUCTION

The following pages are intended to offer a brief survey, from the German point of view, of the problems which had to be solved by the Mixed Claims Commission at Washington in connection with the establishment of the American claims arising from the World War. Moreover, they deal with questions whose treatment by the Commission may arouse a more general interest.

The book contains brief sketches, the first drafts of which were usually written under the direct impression of the discussions in the Commission itself. These sketches are designed to serve primarily as an introduction to the decisions themselves. They do not purport to be exhaustive attempts at a learned solution, nor do they try to give a systematic construction of the legal principles touched upon in the proceedings of the Commission. Each chapter is to be considered as presenting, quite apart from the other chapters, an independent viewpoint with regard to the problems treated therein. It is perhaps an inevitable consequence of such a method that points of view and modes of reasoning will recur now and then in the individual chapters.

It must be stated clearly at the outset that the "legal" foundations of the Treaty of Versailles as such are not worthy of any comment.[1]

The endeavor of the United States to clothe the "application" of the provisions of the Treaty of Versailles with the guaranties of law has alone given those principles a significance transcending their ephemeral right to exist. For the necessary consequence of this endeavor was that view-points and principles of international law had to be used as supporting and guiding factors in the maze of contractual provisions which are often heaped upon each other in a contradictory and illogical manner.

[1] Nevertheless, many principles based solely on the special provisions of the Treaty of Versailles and laid down by the Commission, as well as some decisions rendered by it, may retain a significance over and above their momentary value. It is already becoming apparent that in dealing with the Commission's decisions American writers show a certain tendency to ascribe a more general applicability to these decisions, quite apart from their specific dependence upon the Treaty of Versailles.

This confirms the experience of the Commission, which in the utilization of earlier international decisions frequently witnessed a strong tendency toward excessive generalization of decisions rendered on the basis of special circumstances of law or of fact.

It is to the everlasting credit of the United States that even after the successes and impressions of the last war it has remained true to its principle of settlement by arbitration. And even if Germany may honestly believe that in many important points the results achieved in Washington impose unjust burdens upon her, yet it should not be forgotten that the United States is the only nation which as a matter of principle has accorded the German people not only the right to be fully heard in all questions pertaining to the claims for indemnity, but also the privilege of cooperating fully, and that the Americans have approached the important differences which of course existed, in a spirit of honest cooperation and fair treatment.

Serious disappointments awaited the Germans, whose representatives were called upon to defend the rights of a vanquished people in a foreign atmosphere and against foreign conceptions of law. But all these disappointments could never shake their faith in the upright spirit of the Umpire, Judge Edwin B. Parker, who was ever animated by a meticulous striving for impartiality.

An important consequence of the decision of the United States to deal with the claims on the basis of arbitration was that those claims which according to the Treaty of Versailles—Article 233 and Annex 1 *sub* Article 244—had been established onesidedly and more or less uncontrollably by the Reparations Commission and which represent the reparation claims proper, also came up for contradictory discussion and decision on their merits.

The settlement of this portion of the American claims, as well as of the so-called neutrality claims, i.e., those which dated from the period of American neutrality, formed the most important part of the labors of the Commission. In dealing with them, questions of a more general importance, which will be considered in the following chapters, arose and were discussed. On the other hand, claims arising from the liability of Germany for the employment of extraordinary measures of war, and the so-called private debts, i.e., claims arising from matters involving private law alone, for which classes of claims the awards of the British court of arbitration were decisive in many points, assumed a legally much less important place in the decisions of the Commission.

The reason therefor lies in the differences of subject matter. The manner in which the Treaty of Versailles makes Germany accountable for the employment of extraordinary measures of war, can give rise only to questions of interpretation of the text of the provisions in question. And similarly the manner in which the treatment of private

legal relations is dealt with in the treaty may perhaps lead to interesting questions of private law, but it can hardly serve to open problems of international law.

On the other hand, the reparation claims proper and the neutrality claims, as arbitrarily and dictatorially as they have been imposed upon Germany, always retain the basis of general international relations of the nations with respect to each other, as they are laid down in international law, so that despite the fetters imposed upon this body of law by the treaty, continual recourse was necessarily had to general law for the purpose of dispelling doubt and filling in gaps.

This recourse was all the more frequently necessary since—at least in regard to the reparation claims proper—the method of liquidation chosen by the United States could not always be adapted readily to the reparation system of the Treaty of Versailles.

To judge by the contents and method of this treaty, with its reparation provisions as outlined in Part VIII, it did not aim at the support of the "injured" economic interests of separate individuals, but rather at the indemnification of the allied nations as a whole.

An adaptation of these principles to the indemnification of individuals was accordingly bound to meet with obstacles.

But precisely these difficulties often led to the better and clearer elaboration of the underlying problems.

These problems themselves, however—and that is the writer's fundamental justification in preparing the present work—have touched upon questions which, so far as we could determine, have never been treated systematically in Germany, though they have been discussed in other connections. It is clear that they deserve most serious consideration, especially with regard to the future.

Private International Law—not to be confused with international private law, which is a part of private law—is the designation which I should like to apply to that section of public international law which deals with the conditions in public law and the general material prerequisites whereby the claim of a separate individual who has been injured in his person or in his property may be pressed as such by the nation to which he belongs against another nation. This is a field which in future will doubtless claim increasing attention.

It is certain that the idea of arbitral settlement, especially with respect to disputed claims of individuals (including corporations) based upon international measures, will continually gain in importance.

But precisely the development and treatment of the general questions which arose in this connection before the Commission in Washington show how much still remains to be done in this field.

For the promotion of sound international relations, the method of settling these questions is much less important than the urgent need of some settlement, whatever it may be.

The principle of settling international disputes by courts of arbitration, a principle which is of inestimable value for promoting better understanding among the nations, early laid the foundation, in the international treatment of the claims of individuals based upon international law, for the establishment of certain general norms which formally and materially regulate such claims.

The two extremely valuable collections of the American scholar, John Bassett Moore, *A Digest of International Law*, eight volumes, and *History and Digest of the International Arbitrations to which the United States has been a Party*, six volumes, and the well-known work of his pupil, Professor Edwin Borchard, *Diplomatic Protection of Citizens Abroad*, as well as the compilation of Ralston, *International Arbitral Law*, and the recently enlarged edition *The Law and Procedure of International Tribunals*, offer manifold and interesting material in this connection.

But this material shows at the same time how doubtful all questions still are, how changing and contradictory is the attitude of the governments and also of the arbitral courts with respect to these questions, depending upon whether they take the part of the plaintiff or of the defendant, and to what extent the political factor of power occasionally asserts itself in them, to the detriment of impartial law.[1]

The establishment of order and rules in this respect will be a task of international conciliation, and will perhaps devolve primarily upon the leading forces which are active at The Hague for the development of international law.

Theoretically, however, it will be the duty of German legal scholars, with their methods of deduction and systematization which are foreign to the spirit of Anglo-American law, to take a part in this labor.

And in practice it will be the duty of our German diplomacy to pursue the development of these problems in order to be prepared when it becomes necessary to protect the German interests in the development of Germany's relations to foreign countries.

[1] In a somewhat different connection the presiding judge of the Reichsgericht, Herr Dr. Simons, in a thoughtful lecture delivered before the German Society for International Law on June 4, 1925, also called attention (p. 22) to this unfortunate fact.

If in the future revision of the legal relations of the nations to each other, the extent of legal protection claimed by the Germans is not to be considerably less than that which according to Anglo-American conceptions is the rightful prerogative of the Anglo-American world, there is only one alternative; to wit, that either the theories controlling private international law and their application shall be more closely assimilated to the German concept of law, thus restricting the extent of protection accorded at least by the United States to its citizens, or that the German conception shall emerge from its position of isolation and shall approach the more pretentious and far-reaching American theory.[1]

The interpretation of the treaties of Versailles and Berlin gave rise to most serious differences of opinion between the two nations in many fundamental questions. These were the result of a radically divergent attitude toward the problems and conceptions underlying the questions. Such differences could have been avoided in part if the general principles of law had been developed more uniformly.

The development of the American principles of protection accorded to American citizens, as it has manifested itself in recent treaties with numerous South-American states and in the still more recent treaty with Mexico, is so far-reaching and so in harmony with the conscious power of this mighty state that it will inevitably influence the gradual evolution of inchoate "private international law." And it is quite necessary to direct our attention seriously to these questions.

We repeat that the following pages touch only the most important questions which came before the Commission. That they do so from the point of view of the German Commissioner goes without saying. For a more thorough study, the reader is referred to the exhaustive and profound memoranda in which the representatives of the two states untiringly compiled and utilized materials and points of view.

[1] Attention is called to the interesting remarks of Dr. Hermann Isay in his lecture "The Isolation of German Legal Thought." [*Die Isolierung des deutschen Rechtsdenkens*, Berlin, 1924] especially on p. 20.

As a characteristic example of the differences prevailing between the German and the American attitude, the following incident is cited:

An American creditor had informed his German debtor by letter that he would withdraw the petition which he had submitted to the American agent. Nevertheless the claim was presented to the Commission a few months later by the American agent. When the German agent reproachfully alluded to the letter wherein the withdrawal was announced, the American agent replied in astonishment that such a promise was not binding because the necessary "consideration" had not been given.

But of course the decisions of the Commission itself, in so far as they deal with the fundamental questions, will be of primary importance for the further study of the problems. We assume that a complete collection will be published in America after the labors of the Commission have been concluded.

CHAPTER I

HISTORY AND DUTIES OF THE COMMISSION

After the Senate of the United States had refused to ratify the Treaty of Versailles which had been signed by President Wilson, and after an attempt on the part of Congress to terminate the state of war with Germany had in turn been vetoed by Wilson, the so-called Knox-Porter Resolution, adopted by both houses of Congress soon after the inauguration of President Harding on March 4, 1921, and approved by him on July 2, 1921, declared the state of war to be "at an end."

In the resolution it was stated that "in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages" (Sec. 2 of the resolution). As specific sources for such "rights," "privileges," etc., were mentioned the terms of the armistice, the participation of the United States in the war, the Treaty of Versailles and those rights "to which it [the United States] is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."[1] [2]

The pertinent sections of this resolution were incorporated in the formal treaty of peace with Germany, the so-called Treaty of Berlin of August 25, 1921.

[1] The exact text of Sec. 2 is as follows:

Sec. 2. "That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the Treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise."

[2] It is worth noting that, as the Umpire says in Decision VII, the reservations of Sec. 2 are in part directed not against Germany but against the "associated" powers, with respect to which the United States wished also to safeguard all its rights acquired by virtue of its participation in the war, etc.

Moreover, Article I of this treaty expressly provided that Germany undertakes

> to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

In order to establish the financial obligations devolving upon Germany as a result of these provisions, an agreement was made between the two governments on August 10, 1922, whereby a Mixed Commission was appointed. It was to consist of one commissioner for each state and of an umpire to be appointed by the two governments. The latter was to decide "upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings."

The selection of the umpire was left by the German Government to the President of the United States, and thus another important step was taken toward the reestablishment of the relations of mutual confidence which had formerly existed between the two nations.

The President appointed the highly respected member of the highest American court, Justice William R. Day of the United States Supreme Court, while Judge Edwin B. Parker was chosen American Commissioner and the present writer, German Commissioner.

In the spring of 1923, Judge Edwin B. Parker, with the consent of the German Government, took the place of Justice Day, who retired for reasons of health,[3] while Mr. Chandler P. Anderson, Counselor for the Department of State under President Taft, who had already represented the United States in several arbitration commissions, became American Commissioner.

The decisions of the two Commissioners, and those of the Umpire, respectively, were to be "accepted as final and binding upon the two Governments" (Art. VI, paragraph 3, of the Agreement).

The Commission was to decide upon those claims "which are more particularly defined in the treaty of August 25, 1921, and in the Treaty of Versailles," and which are then specified in Article I of the Agreement in the following three categories:

[3] Justice Day died a few weeks later.

1. Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;
2. Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;
3. Debts owing to American citizens by the German Government or by German nationals.

The Commission agreed that this formulation did not serve to establish any new legal basis for the American claims and that it had merely a declaratory (or descriptive), not a constitutive significance.

In Germany the Agreement was approved by the legislative bodies by laws of January 31, 1923 (*Reichsgesetzblatt* II, p. 113),[4] while in the United States it was merely authorized by the President. Accordingly, so far as the United States is concerned, the Agreement does not possess the significance of a treaty, which would have required the advice and consent of the Senate (with a majority of two-thirds), according to Article II of the Constitution of the United States.

It is not likely that difficulties will arise as a result of this circumstance, though it should not be overlooked that the legal force of the Agreement is thereby weakened considerably. Thus it is doubtful, for instance, to what extent the rejection on the part of the Commission of a private claim made against a German debtor is formally binding as between creditor and debtor.

The formal preparations for treating the vast material, which in the form of some 13,500 claims involving about one and one half billions of dollars [5] without interest were to be handled and decided upon by the

[4] Cf. also the German decree of June 28, 1923 "for the execution of the German-American Agreement of August 10, 1922."

[5] About 11% of the total sum represented by the claims was actually awarded. In reply to the assertion made again and again in America, even by responsible persons, that the total of the indemnity sum gives an idea of the extent of the misdeeds committed by Germany against Americans and American property, and of the "wrongs" and "outrages" of Germany, the "arch malfeasor," it must be emphasized that according to the provisions of the treaties of Versailles and Berlin and the interpretation given them by the Umpire, Germany was accountable, not only for the period after America's entrance into the war but also for the entire duration of American neutrality, both for all illegal measures—i.e., those contrary to international law—and even for all legal measures—i.e., those in harmony with international law—in so far as they were prejudicial to an American. Germany was

Commission, lay in the hands of the two agents, to whom a number of legal assistants were attached. Naturally there were considerably fewer Germans than Americans.

On the German side the government was represented by the Privy Councilor of Justice and Legation Karl von Lewinski, while on the American side Robert R. Morris and, after his early retirement, Robert W. Bonynge, both attorneys at law in New York, represented the government.

The German representative was assisted for a long time by the former Councilor of Legation Dr. O. C. Kiep, and then after Dr. Kiep had received a call to the Chancellery of the Reich, by Judge M. von der Decken, and until October 1925, by Dr. Paul Leverkühn, while from the spring of 1925 on, Dr. Hermann Janssen and from October 1925, on, Dr. W. Tannenberg acted as assistants. The German side

accountable also, for the period of America's participation in the war, for the acts of her own allies and even for war damages, in the narrower sense of the term, committed by her enemies. Thus the damages of an American whose property on the Rhine was destroyed by British fliers, were charged against Germany. And this would have been the case even if that property had been destroyed by American fliers. The reparations for the death and injuries of American nationals do not exceed a total sum of 4 millions of dollars, which includes the personal damages arising from the sinking of the *Lusitania* for which the claims amounted to 50 millions, reduced by the decisions of the Commission to about 2¼ millions.

Germany was also held largely accountable for the damage arising from the destruction of non-American, e.g., British or neutral vessels and goods, in so far as American insurers and re-insurers were involved in the loss, even if the destruction took place in a completely unobjectionable manner and in accordance with the principles of international law, so that the neutral owner himself, for instance, had no right to make a claim.

A further very important part of the indemnity has its origin in the obligation of the German Government to restore the original value of depreciated sums owed by German debtors to American creditors. The oft repeated assertion that Germany must also pay indemnity for losses arising from the sale and disposal below value of American property confiscated in Germany is easily refuted by the fact that in Germany—quite in contrast to the drastic measures taken in America—no forced liquidation whatsoever took place. *No* American enterprise and *no* American share in any non-American enterprise was liquidated and sold. The German Government restricted itself to registration of American property and administration thereof by individually commissioned persons, or, as the report of the American Chamber of Commerce in Berlin puts it: "Germany merely regulated and administered American property." So far as the administration of American property in Germany is concerned, only two cases were presented to the Commission wherein as much as a suspicion of careless or objectionable administration is raised. The claims made in this connection do not exceed the sum of $150,000.

was also assisted by a young American attorney, Thomas J. Healy. The labor which these gentlemen had to perform was tremendous both in amount and intensity, and its splendid and successful accomplishment under the leadership of the German representative can hardly be overestimated. It was possible to achieve this only by virtue of the painstaking and excellent work by which the American section of the German Foreign Office under the legal guidance of the Councilor of the Hanseatic Supreme Court, Herr Dr. Hofmann, supported and furthered the German interests.

It soon became apparent that the vast material, which in amount exceeded everything which ever confronted any previous international commission, could not be handled in the usual manner, especially if the Commission, in accordance with its intention, was to perform its labors in the shortest possible time. The attempt of the first American agent —probably suggested by his experience as a member of the American-Venezuelan Commission—to have the Commission decide the claims in numerous individual cases with extensive and detailed preparation, using the most typical cases as a foundation, soon proved unfeasible.[6]

Hence new methods had to be found. Under the leadership of the Umpire, an entirely novel and independent mode of approach was devised. The basic idea was to supplant the individual decision by general principles calculated to determine ways and means whereby the two sides might dispose of all superfluities.

In so far as the questions to be decided were brought before the Commission in a general form, these principles were established in so-called administrative decisions; in so far as they were set up by means of individual cases, they were established by generalized opinions based on the cases.

In case the two Commissioners had motivated their dissenting view in writing, the votes of the Commissioners together with the decision of the Umpire, which in part can be understood only in the light of its attitude toward these votes, were published.

In preparation for these decisions, the two agents exchanged written memoranda wherein they collected and motivated their points of view with care and in a manner which is often of scientific value, applying material which is important also from the point of view of international law. For a future student of the work of the Commission, these memoranda will furnish invaluable material.

In important questions the written memorandum was supplemented

[6] The American-Venezuelan Commission had decided 53 cases in five years.

by a verbal plea, but in accordance with the provisions of the Agreement of August 10, 1922, only the agents and the members of the two staffs, not the attorneys of the interested parties, were admitted.

With the help of the general guiding principles, the two agents could in most cases (except when complicated disputes in private law were involved) formulate the facts essential for the decision of the individual case in a so-called agreed statement drawn up jointly by the two agents, and on the basis of this the Commission could render its decision either by award or dismissal.

In the case of uncertainties or gaps, the agents could supplement the agreed statement by "interrogatories," i.e., by specific written questions to be presented to the parties or witnesses. This is a method which the Commission itself also used in individual cases.

Moreover, in cases which required special investigation in Germany, the summers were sometimes used for preparations and sometimes for settlement by compromise, the two agents and the reporters cooperating.

Except in special cases before the Umpire, the parties or witnesses were not examined before the Commission.

Questions of the burden of evidence were discussed but never made the basis of a formal decision.

The Commission did not overlook the disadvantages which in this respect often resulted for Germany from the fact that the claims were based solely on the one-sided material of the interested plaintiff parties. Sometimes this fact was taken account of in the decisions. Numerous claims were dismissed because of insufficient verification in fact.

In establishing and utilizing the actual material, the spirit of cooperation prevailing among the representatives of both sides was a great help in simplifying and hastening the work.

It proved especially difficult to determine those questions the decision of which was necessary and expedient for the work of the Commission.

The task was considerably complicated by the fact that this was absolutely virgin soil upon which the material to be deduced from the Treaty of Berlin and especially from the Treaty of Versailles had to be formed and shaped in conjunction with the principles of international and civil law.

Simple classification of the claims, though of course necessary and helpful, was not sufficient for handling them.

The "categorization" of the claims mentioned in the Agreement of August 10, 1922, and described above, proved to be of no practical usefulness.

Accordingly the Commission used a general classification which took the material foundation more into account, and in accordance therewith the claims were divided as follows:

1. The claims belonging to the period of the war and specified in the main in Annex 1 *sub* Article 244 of the Treaty of Versailles, i.e., the reparations claims proper. As stated in the introduction, claims derived from these provisions were submitted for the first and only time to arbitration on the part of a mixed commission.

2. The claims dating from the time of the neutrality of the United States, i.e., the so-called neutrality claims.

Especially in cases in which the German point of view was successful, the treatment of such claims was bound to go deeply into the norms of general international law. The chapter on neutrality claims is devoted to these cases.

3. The claims for indemnity resulting from extraordinary measures of war in accordance with Article 297 and Annex 1 *sub* Article 298 of the Treaty of Versailles, and finally

4. The claims of private American creditors against private German debtors, the so-called private debts.

The German Government expressed scruples against including this class of claims, but the American Government attached importance to their settlement together with the others by the Commission. As the labors of the Commission later showed, the American Government had in mind the settlement of these claims only in so far as they were applicable to the liability of the German Reich which the American Government emphasized, that is in so far as they had a foundation in public law. But since this liability could not be determined without reference to the private law aspect of the claim, this part of the work of the Commission caused considerable difficulties which can not be discussed in detail here.[7]

The claims coming under 3 and 4 were not nearly as important to the Commission as those under 1 and 2.

From the attempt to achieve a plan and a settlement for this overwhelming material, there followed, more from force of circumstances than from theoretical operations of thought, the system according to which the Commission took up the individual questions.

[7] Cf. the remarks made in Chapter II.

First of all, the task was externally delimited to a certain extent by determining the norms for regulating the competency to bring suit and the question of liability, including the politically important question of the "personal" and "real" liability of the German Reich.

Within the limits thus laid down, the groundwork had to be determined. The extent of Germany's liability was fixed, and the general principles were clearly defined.

The strongly contested Decision I established the material extent of German liability (pp. 1 *et seq.*) [8] for the neutrality claims and the reparation claims proper. Decision II (pp. 5 *et seq.*) followed with general norms on the laws regulating the material and formal prerequisites of the right to present a claim, with the influence of nationality, delimitation of the jurisdiction of the Commission in apportioning damages among the "rightful claimants," to which, overlapping the material legal norms, there was joined in Part 2 of Decision II the question, left disputed by the text of the pertinent provisions of the treaties of Berlin and Versailles, of the connection between cause of the damage and effect, i.e., the liability for direct, indirect and remote damage.

This second part of Decision II was prompted by the question, submitted at the same time to the Commission, of the liability of Germany for war-risk insurance premiums which was decided in the opinion on war-risk insurance premiums (pp. 71 *et seq.*), but from which the more general motivation was incorporated in Decision II in consideration of its importance as a principle.

For a more specialized case, the same question was treated again in the case, On behalf of Eastern Steamship Lines *v.* Germany, Docket No. 436, pages 71 *et seq.*

Later the problem of causal connection again confronted the Commission, especially with regard to liability for concurrent injuries in the question of Germany's accountability for explosions of mines during the period after the armistice. The decision was rendered in "Opinions and Decision . . . on behalf of Eisenbach Brothers and Company *v.* Germany," Docket No. 5257, pages 267 *et seq.*

Within these limits the material content and extent of the liability had to be determined with a view to establishing the amount of damage.

For *physical* damages this was done by means of the Lusitania cases—the "Opinion in the Lusitania Cases," pages 17 *et seq.* This

[8] The decisions of the Commission are cited according to the pages of the English text mentioned in the prefatory note.

decision was later supplemented by Decision VI, pages 195 *et seq.*, dealing with the question of the right of American nationals to make claims as the result of the death of non-Americans.

For *material* damages it was done in a more theoretical form in Decision III, pages 61 *et seq.*, dealing with reparation for property not destroyed but taken, and with the obligation to pay interest.

Later this decision was supplemented by the important Decision VII, pages 273 *et seq.*, dealing with liability for loss of profit and especially with the definition of "property" in connection with liability for destroyed property.

To the same province of delimitation of material damages belonged the definition of "naval and military works and materials" established in the "Opinion construing the phrase 'Naval and Military Works or Materials,'" pages 75 *et seq.*, in application to sunken vessels, for the destruction and damage of which Germany is not responsible, according to the Treaty of Versailles, in those cases where they are to be considered naval or military material.

This decision was later supplemented in "Opinions and Decision . . . on behalf of Christian Damson *v.* Germany," Docket No. 4259, pages 243 *et seq.*, wherein the definition of "civilian population" was treated in relation to the points of view underlying Decision V.

The liability for sunken vessels led to the question of the right of American insurers to make claims in connection with sunken non-American goods. After the two Commissioners had presented their diverging views to the Umpire, it was settled by a compromise which awarded to the American insurers of such non-American goods a part of their claims.

The question itself, under partially different circumstances of fact, came before the Commission again in connection with the extensive claims of American life insurance companies for insurance sums paid out for reasons of war. The claims which in themselves had arisen from personal damages were formulated by the American agent as "property" damages, and first decided for cases in which insurance payments had been made for the death of non-combatants. But over and above this the companies had also presented *claims for damages* suffered as the result of the death of combatants. The decision was rendered in the "Opinions and Decision in Life-Insurance Claims," pages 103 *et seq.*

After these tasks had been completed, attention was directed toward the more formal work of clarifying and delimiting the requirement of American nationality on the part of individuals. This

had been touched upon in Decision II but required further development. The related question of the formal and material right of American corporations to bring suit, especially with regard to possible foreign interests represented therein, was joined to this.

The nationality of individuals is treated in Decision V, pages 145 *et seq.*, and it was later supplemented by the "Opinions and Decision . . . on behalf of Maud Thompson de Gennes," Docket No. 2262, pages 213 *et seq.*, and "on behalf of Mary Barchard Williams," Docket No. 594, pages 221 *et seq.*, also by "Opinions and Decision . . . on behalf of Edward A. Hilson *v.* Germany," Docket No. 26 (the right of foreign seamen on American vessels to make claims), pages 231 *et seq.*

The corporation question was prepared in detail in two dissenting views of the Commissioners.

It was decided by the Umpire without statement of reasons in practical settlement of the individual cases (Chapter X).

An interesting individual question, not without more general significance, relates to the observance of the periods set for registering claims and to the attempt to evade them. Decision VIII deals with it (pages 347 *et seq.*). It is discussed below in connection with Decision II.

Between these decisions, Decision No. IV was for practical reasons rendered on the treatment of "estate claims," pages 141 *et seq.*

CHAPTER II

LEGAL NATURE OF THE CLAIMS

The draft of a bill of complaint presented by the American side at the opening sessions of the Commission provided that the claim be made by the United States, but "on behalf" of the injured party.

This formulation led to the question of the nature of the claim in substantive law with its far-reaching consequences.

In so far as so-called reparation claims proper in the narrower sense were concerned, i.e., the claims coming under Article 232 and Annex 1 *sub* Article 244 of the Treaty of Versailles, the planned procedure deviated from that provided by the Treaty of Versailles, whereby the Reparations Commission was to examine the claims and determine their amount in a single total with respect to Germany, with the provision that the eventual distribution among the individual parties concerned was to be reserved to internal legislation.

This type of estimating damages, in its method of computation, also reverts to the individual causes of damage, in so far as they form the basis for a reparation obligation on Germany's part according to the Treaty of Versailles. But otherwise it rests upon the theory of a total national reparation. This becomes clear from the fact that the individual participating states have by internal legislation employed different means of delimiting the number of their nationals entitled to indemnity,[1] and that the sums provided for internal reparations do not agree with those charged against Germany.[2] The point of departure for this method of computation is the theory of indemnification for damages to the national wealth. Not every diminution of wealth suffered by an individual national is a diminution of the national wealth.[3]

The American Government did not choose this course; it made the individual claim of its national as such the basis of the procedure.

[1] France, for instance, included insurance companies, while Belgium did not.

[2] England, for instance, provided a sum to meet claims resulting from deaths, but it was quite independent of the amount charged against Germany.

[3] The theory reappears in the decision of the Umpire in the life insurance question, pp. 135 *et seq.*

Therein it followed an old American tradition growing out of the political conviction of its citizens,[4] as it has been expressed before numerous claims commissions, of which the diplomatic history of the United States furnishes numerous examples. In accordance with the American point of view the government chose this course, although, as we have shown, the reparation provisions of the Treaty of Versailles prescribed the theory of a total national reparation. In practice, accordingly, difficulties often developed in applying to individual cases the provisions which had been formulated from a different point of view.

But both methods have one feature in common, viz., they are based upon the international relations of the states to one another. Of course the law resulting from the treaties concluded between the states is also "international law" in this sense. That the two methods are internally related follows also from the Treaty of Versailles, which chose the one method for the reparation claims and the other method for the claims arising from extraordinary measures of war, which also have a basis in international law—under a different form of state cooperation, to be sure.

Accordingly the method of pressing such claims can not be derived from any immanent quality of the claim as an international claim, but only from the will of the participating states.

For the work of the Commission the starting point was the fact that the Agreement of August 10, 1922, concluded between Germany and the United States for the American claims, prescribed the treatment of individual claims and hence fixed this method for the claims which were to be submitted to the Commission.

The legal nature of this claim thus pressed on behalf of the individual but in the name of the nation[5] has a special interest not without practical consequences.

Such claims are also familiar to German law, e.g., in connection with the Samoan and Venezuelan troubles.[6]

[4] Cf. the statements of the Umpire, p. 184, to the effect that these are the "rights and advantages" of the "nationals of the United States," whose protection the American Government has in mind. In their construction and execution they furnish a good example of the old American maxim of "government of the people, by the people, for the people."

[5] This question was also discussed in connection with the prize court established by the Second Hague Peace Conference of 1907. Cf. Schramm, *Das Prisenrecht in seiner neuesten Gestalt*, 1913, p. 412 and also p. 394.

[6] In these cases, too, claims commissions were established.

But in the United States they were made the subject of special judicial and literary discussion.

The Commission used the American conception as its basis, assuming that a commission meeting in the United States for deciding upon American claims must decide the American claims pressed before it in accordance with the American method.

The espousal[7] of such a claim by the government is in itself an internal procedure dependent upon the laws and intentions of the nation making the claim.

The effect of the espousal, however, is international and is subject to settlement in accordance with international law.

In itself such espousal of a claim is conceivable only when a national of one nation derives from a public law act a "compensation" claim against another nation.

The claim of an American shipper derived from a collision at sea with a German vessel in the service of the state therefore would not come under this category. But it would be different in the case of a civil law claim of a German creditor if the "damage" had originated by the public law act of denial of justice on the part of another country.

The legal consequence of the espousal, in so far as it concerns the legal position of the espousing state, was treated by both Commissioners (pp. 153–4 and 168 *et seq.*), and especially by the Umpire (pp. 190–1), in connection with the question when the requirement of American citizenship must be satisfied, discussed in conjunction with the "nationality of the claim." This matter had already been touched in Decision II, pages 5 *et seq.*

By such espousal the state which considers itself prejudiced in the person or property of its nationals assumes the sole responsibility for the manner and extent of pressing the claim. It receives exclusive control thereof, and is in a position to prosecute it, settle it by compromise, or abandon it according to its own discretion as dictated by the interests of the nation as a whole.

Accordingly it can make the espousal depend upon general conditions or such special conditions as it may establish for the individual case.

The general conditions established by the United States have been laid down and published by it.

Special conditions were established by the American Government for valorization claims to be pressed before the Commission, i.e., claims for

[7] This is the term used by the American Commissioner. Cf. his opinion in Decision V.

the restoration of the value of German paper money, in which the government made espousal dependent upon renunciation, on the part of the claimants, of other definite legal remedies to which they were entitled.[8]

It is not certain to what extent the state may use the awarded and collected sum for other purposes.

In so far as the decisions in question were obtained by fraudulent manipulations, the question has been decided in the affirmative by the American courts.[9]

In his interesting remarks the Umpire quite generally denied the right, in other cases, to use the sum for different purposes, at least in awards rendered in favor of definite individuals (p. 191 and note 31). According to his interpretation the sums paid in are "trust funds" for the rightful claimants.

And this at least economically close relation between the damage of the individual and the right of the nation to lodge a claim may even come into play if the indemnity is not collected, in so far as, according to Borchard, *Diplomatic Protection of Citizens Abroad*, Section 144, page 366, a government becomes liable to indemnity in case it "negotiates" an individual claim taken up by it in the common interest, i.e., abandons it in lieu of other compensation.

So far as the legal position of the individual is concerned, it is reflected most clearly in the treatment of the collected sums as "trusts" of the claimant and in the eventual indemnity claim just discussed. But over and above this, the significance in private law is, for example, revealed in the fact that the private claim has or preserves certain functions in civil law. Thus it may be assigned by cession and realized by sale in the case of bankruptcy.[10]

To this extent it might be termed a conditional right, i.e., conditioned by its advocacy through the state.

But this construction is not logical. For on the other hand the individual claim, through its espousal by the state, is merged in the claim of the nation. According to American conceptions it is merged in the national claim. Hence at the moment when it becomes actually

[8] See *Juristisches Wochenblatt*, 1925, p. 1212.

[9] See the Weil and La Abra claims in Moore's *Arbitrations*, pp. 3424 and 1327.

[10] In the decision of Williams *v.* Heard, 1891, 140 U. S. 529, the Supreme Court of the United States decided that such claims of an American represent "property," viz., "that a claim of an American national against Great Britain was 'property.'" Cf. also the remarks of the Umpire in decision on p. 186, English text.

existent, i.e., at the time of its espousal by the state, it is merged so far as the individual claimant is concerned.

In any event a very close relation is thereby established between the individual claim and the international claim of the nation, revealed also in the fact that a state may lodge claims only on behalf of its nationals.[11]

An additional, more external consequence is that—at least before this Commission—the claims can be defended only by agents of the state.

But a much more important consequence is the delimitation of the jurisdiction of the Commission following from this legal nature of the claim.

It is only the international foundation of the claim whereupon the plaintiff state supports itself with respect to the other state, and only this international phase is subject to the decision of the Commission, in so far as its competency is not broadened by express agreement, as occurred here in a certain sense with regard to the private debts (cf. Chapter I).

All other disputed points of a private law nature, perhaps connected with the case but not expressly submitted to the Commission for decision, do not therefore lie within its competency.

If, for example, goods have been sunk, only the incident related to the sinking is subject to the decision of the Commission. A possible dispute as to who—perhaps on the basis of a partnership relation or in consequence of an inheritance case—is jointly entitled to the proceeds must be decided by the competent courts.

Such a dispute would touch the jurisdiction of the court only in so far as the nationality of a "joint claimant" becomes relevant, since for a non-American the presumption of the espousal of this part of the claim by the state would be out of the question.[12]

The question of jurisdiction became particularly live with reference to claims of the families of persons who had been killed. It became a subject of negotiation and decision in connection with the so-called Lusitania cases and was discussed in Decision II, pages 8–9, and also in the German vote on Decision VI on pages 200 *et seq.*

The legal nature of the claim on the part of such families assigns its origin to the effects of the death, i.e., to the incident of liability in public law.

Hence the computation of the injury suffered by the individual

[11] See the chapter on the principle of nationality.

[12] Cf. also Chapter VIII and Decision VII.

survivor is a matter for the Commission. The factors involved in the compensation claims of the families in this connection are no more subject to the private law of an individual country than is the question of liability for the incident itself from which the international claims for the death are derived. They are a part of the facts of the international case. Their judgment and decision are accordingly a matter for the Commission.

The duty of the Commission in such cases is, as the Commission decided unanimously in Decision II, pages 9–10, not the distribution, among various persons, of a fixed sum charged against Germany as the result of a death, but the determination of the amount of individual injuries suffered by relatives, which injuries were pressed jointly as a matter of form but individually as a matter of intrinsic fact.

But much greater difficulties were caused by the legal nature of the claim in those cases in which the Commission had to decide on claims of private American creditors against private German debtors.

The liability of the German Reich for certain obligations of private German debtors, as specified by the treaties of Berlin and Versailles, necessitates a twofold qualification of such claims. They are of an international and hence of a public law nature in so far as they are pressed against the German Reich. But at the same time they retain their private law character.

It is not unobjectionable procedure in such cases to assume that by virtue of the espousal there is a "merger" of the claim with the claim of the state and then to deduce all the consequences thereof.

Even in the characteristic consequence assigned to the merger by the American side whereby the obligated state fulfills its obligation by making payment to the other state and then has neither the obligation nor even the right to concern itself about the remittance of the payment to the individual claimant, the theory meets with objection. For in the settlement of private obligations by a state acting as the guarantor of the private debt, that state has a direct interest in providing that the payment shall get into the hands of the private creditor and that thus the guaranteed private debt be canceled.

If on the other hand we adhere to this theory, it follows that the private creditor loses the right to dispose over the claim at the moment his claim is "espoused" by the American Government. He will no longer be able to cancel it by compensation, nor secure it by arrest, nor press it before the regular courts of law.

The Commission did not by any means overlook the difficulties in-

herent therein. It took account of them, for instance, in all so-called valorization claims in which the state's obligation of valorization was regulated by compromise, but in which the private obligation of valorization remained open as a result of the same compromise, in so far as it restricted itself to rendering the award proper only against the German Reich, and to determining in figures, only as an intrinsic part thereof, the private debt in marks forming the basis of the guarantee and of the state's obligation of valorization.

For the rest, the Commission took the position that a theoretical decision of the above questions of doubt did not lie within its competence.

CHAPTER III

THE NEUTRALITY CLAIMS

Among the problems which occupied the Commission, the question of Germany's liability for claims arising during the period of American neutrality occupied the foremost position materially and temporally.

Was Germany accountable only for acts which violated norms of international law, or which according to the principles of international law entailed compensation? Or was Germany accountable—in accordance with the American view—for every act, regardless of whether it was contrary to international law or in harmony therewith?

The points of view and arguments presented by both sides have their origin in the treaties of Versailles and Berlin. Thus far, especially from the point of view of international law, they can claim no general interest. But two factors justify a discussion of the question. The first is the political and historical position of the question in the genesis of the treaties of Versailles and Berlin. The second is the circumstance that a formulation, which is identical in the salient points, is found also in other international treaties concluded by the United States, so that it seems essential for future clarity that we realize the possibility of so divergent an interpretation in case of a possible subsequent application of the same formulation.

The claims here involved, which we shall briefly call neutrality claims, are mentioned both in the Treaty of Versailles and in the Treaty of Berlin.

In the Treaty of Versailles it is Section 4 of the Annex to Article 298 which deals with them. In Articles 297 and 298, the effect of the extraordinary war measures applied by both sides with respect to enemy property found in the country, and also Germany's liability for such measures as were applied by her are regulated. In the Annex to Article 298 the formal validity of vesting orders on both sides (par. 1), the exclusion of every German claim or action (par. 2) and the expression "exceptional war measures" are clarified. In connection therewith, i.e., in the further regulation of the treatment of German property confiscated in enemy territory, it is provided in paragraph 4 that this German property shall be liable for certain claims against Germany in a

fixed sequence. And among the claims thus listed in sequence there is also that of "claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war." [1]

And similarly Section 5 of the Knox-Porter Resolution incorporated in the Treaty of Berlin provides that "All property . . . of all German nationals, which was, on April 6, 1917, in . . . the possession or under control of . . . the United States of America . . . shall be retained by the United States of America and no disposition thereof made . . . until such time as . . . suitable provision" has been made "for the satisfaction of *all claims* . . . of all persons . . . who have suffered, through the acts of the Imperial German Government, or its agents, . . . *since July 31, 1914*, loss, damage, or injury." To be sure, as appears from the text of the provision in question, quoted in full in the footnote, the claims are described here in detail, but only in the sense of extending the sphere of those entitled to participate in the lien on German property, not in the sense of a more precise definition of the *material* character of the claims themselves, for here too we read only of "the satisfaction of *all claims* against said Governments . . . of all persons . . . who have suffered, through the acts of the Imperial German Government, or its agents, . . . loss, damage, or injury to their persons or property." [2]

[1] Par. 4 reads as follows: "All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war."

[2] The text of Sec. 5 is as follows: "Sec. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been

It may suffice here to call attention to the Treaty of Washington of May 8, 1871, between the United States and Great Britain which submitted the American claims arising from the well-known Alabama dispute to an arbitral court and which thereby became the occasion for a decision of far-reaching importance which, in so far as it led to a condemnation of Great Britain, saw the decisive criterion in the illegality of the British acts, not simply in the "acts committed by England." Article XII*a* in the here relevant portion reads: "The high contracting parties agree that all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty, *arising out of acts committed against the persons or property* of citizens of the United States during the period between," etc. [3]

In connection with this formulation, which as we see is not restricted to the treaties of Versailles and Berlin, the German side called attention to the fact that in both places in which the neutrality claims are mentioned in the treaties, we find not a material definition of the individual categories of claims made against Germany but merely an enumeration thereof for the purpose of determining the categories of claims for which German property is liable.

heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operation of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America."

[3] Cf. for instance also the Claims Convention between the United States and Chile of August 7, 1892: "claims . . . arising out of acts committed against the persons or property," etc.

In accordance with the very rules of the interpretation of treaties, with regard to which, as the final remarks in the Lusitania decision, page 31 (next to last paragraph), show, the Umpire too accepted the principle that the text of the treaties shall be strictly construed against those who framed the treaty and derive rights therefrom,[4] the broad American interpretation seemed untenable, since nowhere in the text of the treaty so far-reaching and grave a deviation from the principles of international law as was now maintained by the American side is even suggested.

The genesis of the Treaty of Versailles and the position taken by the American delegation in France could also be referred to. This delegation, through its speaker, John Foster Dulles, took the position that the exchange of messages of November 5, 1918, between the United States—acting also in the name of the other enemy powers—on the one hand, and Germany on the other, created a *binding peace agreement* for all powers concerned. This agreement was considered as having been made when the allied powers declared that they were ready to conclude peace on the basis of the message of the President of the United States to Congress of January 1918, and on the basis of conditions established in the other messages, with two reservations. This declaration was the reply to the formal declaration of Germany that it would accept peace on this basis. The affirmative reply of the powers—with the two reservations—was transmitted to Germany by Secretary of State Lansing, so that with the approving receipt of the declaration of acceptance with two reservations the peace was formally concluded.[5] In this Mr. Dulles too saw the "form and substance of an agreement." [6]

Accordingly it was interpreted to be the sole duty of the conference in Versailles to "apply . . . the peace terms" (Baruch, *op. cit.*, p. 330) and to determine the details of such application.[7]

[4] "The language, being that of the United States and framed for its benefit, will be strictly construed against it."

[5] Baruch, *The Making of the Reparation and Economic Sections of the Treaty* (New York, 1920), p. 327.

The agreement "came into being, when the Allies, after carefully considering this correspondence which had passed between the United States and Germany," stated, "They declare their willingness to make peace with the German Government on the terms of peace laid down by the President's address to Congress of January, 1918, and the principles of settlement enunciated in his subsequent address."

[6] Cf. also Temperley, *A History of the Peace Conference in Paris* (London, 1920), p. 381.

[7] Temperley, *op. cit.*

"As to the terms of peace and the principles of settlement the German and American

At that time the American delegation considered itself bound by these conditions. But it interpreted them to the effect that in the restriction of Germany's obligation to repair damages arising for the civilian population from the "offensive" war there lay no renunciation of rights derived from the *violation of international obligations*. The delegation deduced from this that all claims not expressly stipulated by treaty were justified only in so far as they had a basis in international law, "arising from illegal acts." [8]

Referring to this attitude of the American delegation, the German side stressed the fact that paragraph 4 of the Annex to Article 298, which owes its inclusion, as the so-called "Lusitania Clause," to an American suggestion, must be interpreted in accordance with this unequivocal position, all the more so since President Wilson [9] too, in the dispute concerning the extension of the German obligation to make reparation for pensions, support and payments to war prisoners—clauses 5, 6 and 7 of Annex 1 *sub* Article 244—adhered to the principle that the power to extend the German obligations does not establish the right to do so.[10]

Governments reached general agreement that such terms and principles shall be those stated by President Wilson in his Address to Congress on 8th January 1918, and in his subsequent address, particularly the address of the 27th September, and that the *object of peace discussion would be only to agree upon the practical details of this application.*"

[8] Baruch, *op. cit.*, pp. 295–6.

"We take the view that the terms of peace proposed and accepted are not to be construed as waiving any clear right of reparation due under accepted principles of international law. We thus recognize that our agreement with Germany is not in derogation of those principles of jurisprudence upon which the French memorandum and upon which Mr. Hughes' address purport to base themselves. But we are compelled to recognize that in so far as we base our claims, not upon contractional law but on the law of torts, we are restricted to damage arising from *illegal* acts. It is not enough that an act be immoral, that it be cruel, that it be unjust, unless at the same time it be illegal. It is the quality of illegality alone which in law gives rise to a right of reparation. International law and all municipal jurisprudence of all civilized nations are in accord in this respect.

"Accordingly it is the American proposition that where the enemy has committed an act clearly violative of international law as existing at the time of the commission of the act, he is liable to make reparation for the damage caused thereby."

[9] Edward M. House and Charles Seymour, *What Really Happened at Paris* (New York, 1921), article by Lamont, p. 270.

"The President approved the stand of the American delegation, declaring that the contention on the part of the other delegations that war costs should be included is clearly inconsistent with what we deliberately led the enemy to expect and cannot now honorably alter simply because we have the power."

[10] This argumentation is not shaken by the fact that later the President yielded

Thus it was denied that paragraph 4, in text and purpose, has the far-reaching significance which is now claimed for it and in connection therewith it was also denied that Section 5 of the Knox-Porter Resolution has so far-reaching a significance. In support of the claim that this resolution can not be applied by America over and above the tenor of the provision of Section 4 *cit.* of the Treaty of Versailles, both the text of the resolution, which does not mention the material character of the claims for which German property is to be held liable, and the so-called Dresel note were cited.

In the course of the negotiations leading to the conclusion of the Treaty of Berlin, the German Government attached great importance to avoiding that the excessive burdens imposed upon it by the Treaty of Versailles be increased by still greater obligations, and hence it endeavored to secure assurances in this regard by means of inquiry. In his reply of August 22, 1921, the commissioner of the American Government, Mr. Dresel, stated that the American Government did not interpret the Knox-Porter Resolution as implying the establishment of new rights against Germany and that the paragraph in question did not create new obligations for Germany over and above those established by the Treaty of Versailles. The reply declares moreover that according to the belief of the Department of State there is no difference between the provisions of the Knox-Porter Resolution and those of the Treaty of Versailles, with the exception of the provisions of Section 5 of the Knox-Porter Resolution referring to the satisfaction of American claims.[11]

Since according to the German view this differentiation mentioned in the reply obviously concerned only the *extent* of the liability of German property seized in the United States, which liability was extended by Section 5 of the resolution to such claims as come under the category of reparation claims proper, according to the terminology of the Treaty of Versailles, and for which German private property would not be liable under the conditions of the Treaty of Versailles, the German side defended the view that Section 5 of the resolution implied no ex-

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in the pension claims, etc., for on his return from Europe and in opposition to his advisers, who declared that logic was against such claims, he did so with the words: "Logic! Logic! I don't give a damn for logic. I am going to include pensions!" House and Seymour, *op. cit.*, p. 272.

[11] "It is the belief of the Department of State that there is no difference between the provision of the proposed treaty relating to rights under the Peace Resolution and the rights covered by the Treaty of Versailles except insofar as a distinction may be found in that part of Section 5 of the Peace Resolution, which relates to the enforcement of claims of United States citizens for injuries to persons and property."

tension of paragraph 4 of Annex 2 of Article 298 of the Treaty of Versailles, and that its purpose, as well as that of the aforesaid paragraph 4, was merely to enumerate the existing claims, not to create new claims.

It was not overlooked that apart from reparation claims for pensions, etc., which were incorporated in the Treaty of Versailles in clear violation of the agreed conditions of November 1918, the principles of liability established in Annex 1 *sub* Article 242 for reparations proper also exceed the November agreement. But according to the German conception this did not modify the general principle that in so far as modifications and extensions were not expressly made, the November agreement with the supplementary Dulles interpretation must be considered as being still in force.

The very fact that for the basic formulation of German liability in Article 232 the allies used the text of the November agreement and then by the peculiar circuitous means of general reference to an annex and by the inclusion in this annex of other more sweeping liability provisions, for instance for claims of the governments themselves (instead of nationals) for reparation of pensions, etc., effected the extension of German liability to principles not contained in the November agreement—this very fact was cited to show that the allies too considered the express inclusion of deviating or extended liability provisions in the treaty as being necessary for their validity.

As has been stated, the American side maintained that both by paragraph 4 *sub* Article 298 and by Section 5 of the Knox-Porter Resolution every damage wrought by an act of Germany or its agents entails reparation, and that international points of view, especially the question of the illegal nature of the acts committed at the time, must be disregarded altogether.

At the request of the Umpire, to whom the question was presented for decision after the two Commissioners had disagreed, not only the general question whether the claim must be founded in international law, but also the special question to what extent Germany is accountable in international law for acts committed in sea warfare, and the question of the justifiability of the German submarine warfare were discussed.

It would exceed the scope of this sketch to recapitulate the very detailed arguments of the German agent. We must refer here to the two documents,[12] the second of which endeavored to furnish the proof, supported by extensive material, that the German Government for its

[12] Claim No. 9, brief and opposing written statement on behalf of Germany, and Annex thereto, *Sea Warfare and International Law during the Late War*.

part made every effort to keep its sea warfare within the limits prescribed by the Declaration of London,[13] and that it went beyond these limits with reluctance and only *as a means of retaliation* against the British conduct of war, which deviated more and more from the principles recognized by international law.

In conjunction with this extensive material there were very interesting pleas made before the Commission, and the question was also discussed to what extent, in the case of acts which may be justified from the point of view of retaliation but deviate from existing norms, a neutral would be entitled to reparations, in other words to what extent such acts would come under the legal acts of a belligerent power which, however, are liable to indemnity with respect to neutrals.

But these and other related questions remained undecided because the Umpire decided the general basic question against Germany, and in Administrative Decision No. I held Germany responsible, in so far as it was not a question of claims of the American Government itself, for all "acts of Germany or her agents in the prosecution of the war," regardless of the provisions of international law.

With the consent of both governments, the reasons for this decision were not published and therefore can not be quoted.

But the Umpire took up the question again in connection with his decision on the claims of the life insurance companies [14] and also in the far-reaching Decision VII.[15] To this extent the points of view which guided the Umpire in the decision in question may be published and are subject to discussion.

In the decision on the claims of the life insurance companies, he admits that the two relevant passages in the treaties of Versailles and Berlin contain no definition of the "claims" treated there.

But he assumes that these claims are "obviously in the nature of reparation claims" in the narrower sense.

He proceeds from the thought that the United States, as one of the victorious powers in the war, is entitled to the same treatment with regard to indemnification of its nationals as are the nationals of the other powers during the same period. Otherwise he would consider the United States "penalized for its neutrality," which condition it was the purpose of paragraph 4 of the Annex *sub* Article 298 of the Treaty of

[13] Cf. the remarks of the Umpire in the War-Risk Insurance Premiums Opinion, pp. 34–5.

[14] See p. 130.

[15] See pp. 312, 316, 322, 327 and 329.

Versailles to avoid. "The position of the United States . . . entitled it to demand that, . . . its nationals should not be penalized for its neutrality, but should, with respect to all damages caused during the period of American neutrality by the acts of Germany, be placed on a parity with the nationals of its Associated Powers suffering damages during that period." (Decision p. 130.)

In Decision VII the circumstance is again touched—page 316—that through the much discussed paragraph 4 of the Annex to Section IV of Part X provision was made for the neutrality claims not considered up to that point in the draft of the Treaty of Versailles.

Later in connection with the Knox-Porter Resolution—page 327—it is decided that Section 5 of the resolution, in so far as the neutrality claims are concerned, adopted the text of paragraph 4, and in full agreement with the point of view always maintained by the German side and in accord with the German interpretation of the Dresel note, it is stated that the Knox-Porter Resolution does not go beyond the indemnity obligation imposed by the Treaty of Versailles—pages 327, 326.

And in conjunction therewith—page 329—and again in agreement with the German arguments—the important conclusion is reached that the expressions employed in the Knox-Porter Resolution, when employed in the same connection, must have "the same meaning."

Thereby the German line of reasoning with reference to the extent of the liability for neutrality damages was given a support which seemed to the Germans themselves not unimportant also as regards Section 5 of the resolution. For meanwhile, in a decision of the Permanent Court at The Hague[16] of September 12, 1924, on a Graeco-Bulgarian dispute which turned upon the interpretation of an identical and corresponding provision of the Treaty of Neuilly, it was pronounced with reference to paragraph 4 of the Treaty of Versailles here in question and its origin due to the Lusitania case that the expression used in paragraph 4 means acts contrary to international law—"the expression 'acts committed,' which must moreover be interpreted taken as it stands, contemplates *acts contrary to the law of nations and involving an obligation to make reparation.*"

By this decision that interpretation is precisely established which the arbitrator Borel, who frequently served in Anglo-German disputes, had already applied in the decision Chatterton *v.* German Reich of

[16] Compare also the decision rendered in the same sense by the Graeco-German Mixed Arbitral Tribunal in the case of Constantin Vanjicoulas (Gr. 166) and Karmatzucas *v.* Germany (Gr. 373), August 23, 1926.

November 8, 1923, whereby the framers of the treaty conceived "acts committed" to be "acts to be blamed," "acts which were wrong." [17]

The legal consequences of these decisions are indisputable. Even if their material accuracy, which can not be discussed in detail here, were more doubtful than the German view makes it appear, it would at least show that paragraph 4 admits various interpretations, of which the one most favorable for Germany would have to be applied, according to established rules.

If we consider also, as the Hague decision emphasizes, that it was the *Lusitania* incident which led to the embodiment of paragraph 4 in the treaty at the insistence of the American delegates, and that these same American delegates through their leader [18] proclaimed the limitation of German liability to acts contrary to international law (in so far as no other agreement had been reached by treaty), but on the other hand left no doubt as to their condemnation of the sinking of the *Lusitania* as an act contrary to international law, this circumstance afforded a certain clue for the intention upon which paragraph 4 is based. This intention, over and above the simple question of the application of rules of interpretation, speaks in favor of the material accuracy of the German interpretation.

At the same time the German side could point to the fact that the "position of equality" of American nationals and nationals of the other belligerent countries was only apparent and had not been fully carried out in the interpretation of the Umpire.

The equality is only apparent inasmuch as it is chronologically based upon the rights of France, Belgium and also England. For these powers, which entered the war during the first days, the period to which the reparation provisions apply is identical with the period of the war and includes the period of American neutrality, while for other belligerent countries, as, e.g., Italy and Rumania, the privileged provisions on reparations go into effect at a later period, i.e., at the time these nations entered the war. Compare Article 232, paragraph 2, which declares the reparations provisions to be applicable for damages

[17] To be sure, in one of his decisions the Arbitrator rejected a limitation of the application of par. 4 to acts contrary to international law—"Par. 4 is not limited to such acts as constituted a direct violation of a clear rule of international written law." On the other hand, in a later decision, J. F. Mellentin *v.* German Reich, he declared expressly that "the Arbitrator does not think that the line which he has followed shows any discrepancy with the opinion given by the High International Court at The Hague."

[18] Cf. note 8, *ante*, p. 28.

which occurred "during the period of the belligerency of each . . . Power against Germany."

Hence the parity envisaged by the American side, in this interpretation, signified a favored treatment of American neutrality claims over that accorded any other power which entered the war at a late date.

But on the other hand this parity did not exist in reality either, for the words "acts committed by the German Government," etc., excluded Germany's liability for reparation claims proper in the case of certain acts of her allies and even of her enemies, as well as in the case of damages suffered by the governments as such. Accordingly the intention to create a condition of parity was at any rate not ascertainable from the only text of paragraph 4 in question and of Section 5 of the Knox-Porter Resolution which was known to Germany at the time of the conclusion of the Treaty of Versailles and at the time of the conclusion of the Treaty of Berlin.

In this respect, too, the German side believed, both the pleas against the material accuracy of the American interpretation and the validity of generally recognized rules of interpretation were in Germany's favor.

The Umpire for his part carried out the idea of the parity of American neutrality claims and the "reparation" claims of the Treaty of Versailles in Germany's favor, inasmuch as he declared that the clauses of the Annex [I] *sub* Article 244, which limits Germany's liability in part, is applicable also to the American neutrality claims.

This was done with motivation in the decision published in the second volume (Decisions and Opinions, p. 843 of the text), in the case of the American-Hawaiian Steamship Co., Docket No. 6454. It involves the injury resulting from the damage caused to the steamer *Kansan* by a German mine on December 6, 1916, at St. Nazaire. The steamship company claimed among other things compensation for the loss of profit as the result of the temporary disability of the steamer. The Umpire rejected this part of the claim, because under the special provisions of Annex [I] to Article 244 there is no basis for a claim for compensation as the result of loss of use or loss of profit.

CHAPTER IV

NATIONALITY OF THE CLAIMS[1]

As has already been pointed out,[2] the formal public law character of a claim is controlled, from the American point of view, by the principle that the personality in which the claim arose[3] must at the moment when the claim arises have a right to the protection of that state which presses the claim. The point of view whereupon this conception is based is that in the person of him who is entitled to protection the nation itself is injured, and that hence the injury to the nation is conditioned by the allegiance of the injured person to it.[4]

The person may be injured in two respects, viz., first in regard to purely human, i.e., physical aspects—in life, health, honor and liberty; and second, economically—in property or wealth.

A more detailed delimitation of such injury to property as would

[1] This chapter is intended to accompany Decision V (p. 145) and De Gennes (p. 213), Williams (p. 221) and Hilson (p. 231) decisions. Purely governmental claims, arising for instance from the sinking of vessels owned by the state, were not considered in the decision or in this discussion.

[2] See the chapter on the legal nature of the claim.

[3] The real material claim is meant which must have originated in the person of a national of the claimant state.

Hence a claim is rejected which arises from the death of an American who perished on the *Lusitania* and whose administrator, upon whom title devolves, was also an American, but whose heirs were British. The fact that the "naked title" was American was not considered sufficient as against the fact that the real interested parties were British. Claim No. 2191, Evan Jones *v.* German Reich.

On the other hand compensation was granted in a case where an American company had a branch establishment in Germany which was formally independent and was managed by two proprietors, one of whom was British. Here the British nationality was disregarded since the "whole benefit" of the German branch accrued to the American company, and the claim, which was justified on the supposition that the claimants were Americans, was admitted. It is clear that the principle of "nationality" was thus considerably weakened in its application.

We shall revert to this in the chapter on causal connection and material obligation for compensation.

[4] This principle was also recognized by the Commission in Decision II, p. 8, rendered by the Umpire at the request of the national Commissioners. Under the head "Original . . . ownership of claim" it is stated: "The enquiry is: Was the United States, which is the claimant, injured through injury to its national? It was not

justify intervention on the part of the state would lead too far afield.[5] It will suffice to define the relation of the person entitled to protection and the claim in question by saying that at the time of its origin the claim must belong to a national of the state pressing it.

If this is not the case, the claim must be rejected regardless of other qualifications.

The application of this principle led to the rejection of many cases by the Commission, e.g., in all cases where originally non-American claims had become American by virtue of inheritance.

To this principle is joined another, viz., that the right to protection of the injured party must extend beyond the period of injury to a definite later period, concerning the fixation of which there was also a difference of opinion in the Commission, to be discussed later. It is the doctrine of the continuity of the nationality of the claim, which the Commission applied in Decision II, page 8, where it was stated under the heading "continuous ownership of claim," with reference to a number of decisions and authorities mentioned in note 4, that "the claim for such loss must have since [i.e., since the decision] continued in American ownership."

Later the American Commissioner[6] in his opinion on the nationality of claims questioned the principle, saying that the national character of a claim is proved by the fact that the nation itself was injured by the injury of one of its nationals, and that it is consequently not admissible to make the right of a government to espouse and press such a claim dependent upon the further requirement that the claim, given a national character by virtue of its very origin, should, at a later period too, in so far as the person of the originally injured is concerned, satisfy, in this same person of the national, the national requirements necessary at the time of origin.

This argument, the importance of which should not be overlooked, though it is not in agreement with international practice or with the practice of the American Government itself, necessitates a brief discussion of the principle first mentioned, whereby "the claim must be nationally owned at the time the claim accrued."

Though it is clear that the injury of the nation wrought by the injury of the individual is the basis for the right of the nation to press the claim, yet the distinction between a real injury to the nation as such and the consequences of the injury of an individual (leading namely to the assumption that the nation has been injured) must be borne in mind. The same process which, e.g., in case an injury is suffered by the ambassador of a nation, represents a direct injury of the nation itself, causes only in its consequences a more theoretical injury to the nation in case it were directed against a private individual entitled to protection. As American writers have expressed it, it is only an indirect injury. "Whoever uses a citizen ill, indirectly offends the state," says Vattel[7] and also Borchard.[8]

This indirect form of offense was instrumental in establishing and justifying the principle of a necessary "continuity" of the "national ownership of the claim." The "indignity" of indirect injury can be regarded as important enough to set the apparatus of national intervention in motion only in case the injured person still actually owes allegiance to the plaintiff nation at the time of such intervention—or until the time of the decision of the claim—or in case the claim still really accrues to a national of that nation. Thereby the preponderating international action is freed of its arbitrary and discretionary nature and appears in the light of a real norm in international law. Only the force of a legal norm could prompt international courts of justice to recognize this principle. For the undeniably frequent rejection of claims in which the continuity of ownership was not observed is conceivable only in case the courts denied the discretionary power of the plaintiff state to press claims lacking continuity and being national only in origin, thus discrediting the opposite point of view taken also by the American Commissioner.[9] But they were justified

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so injured where the injured person was at the time of suffering the injury a citizen of another state."

But cf. the remarks of the Umpire in Decision V, p. 177 (last paragraph).

It is still more explicitly stated by the American Commissioner in his Opinion on the "nationality of claims." There we read (p. 151): ". . . the right of a government to espouse a claim arises on the general principle that the injury to a national is an injury to the nation . . ." and (p. 154): ". . . the principle of international law above mentioned, that the basis of the right of the Government to present a claim internationally is that the injury to the national is an injury to the nation, for which it is entitled to claim reparation."

[5] Cf. Chapter VIII on "The extent of Germany's Obligation to give Compensation for Damage in Respect of Property, 'Loss', and Causal Connection."

[6] The Umpire too later expressed doubt as to the extent and binding force of this rule. Compare Decision V, p. 177.

[7] Vattel, Chitty-Ingraham ed., Phila., 1855, Bk. II, Chapter VI, Sec. 71.

[8] Borchard, *Diplomatic Protection of Citizens Abroad* (New York, 1916), p. 351, Sec. 134: "The indirect injury which the state sustains by an injury to one of its citizens warrants bringing into operation the state's protective machinery."

[9] See Ralston, *International Arbitral Law* (Boston, 1910), Chapter V, p. 105;

in this only if they recognized a legal principle which binds international intercourse in this respect.[10] Hence the German side emphasized the fact that the Supreme Court of the United States applied this principle in a case growing out of the activity of the Franco-American Claims Commission[11] and had expressly stated that the Franco-American Commission had "no authority" to decide upon claims "except as held, both at the time of their presentation and of judgment . . . by citizens of the other country," and that the Court considered the legal effect of this principle so binding[12] that it designated every award not in harmony with it as "invalid and void."

Hence the German Commissioner, in agreement with the German agent, adhered to the principle that the continuity of the nationality of the claim is requisite.

This basic disagreement of the two Commissioners had no practical consequence since the American Commissioner recognized that in view of the actual treatment of such claims in both states, in accordance with that principle, there is in the present case an agreement on the part of both states to the effect that "both Governments understood and expected that this practice [i.e., of continuity] would be applied with respect to claims under that Treaty."[13]

But the difference of opinion retains its general significance in so far as, according to the American interpretation, it depends upon the free will of the claimant state, in default of a special agreement, whether and to what extent it will take account of the idea of continuity, while according to the German view deviations from the existing practice are admissible only with the consent of the state against which the claim is directed.

An effect of the American conception, which emphasized the one-sided right of determination on the part of the claimant state, soon

Borchard, *Diplomatic Protection*, Sec. 134, p. 352: "This result has been established by numerous arbitral decisions."

[10] Of course such a legal principle could be modified at any time by agreement.

[11] Burthe *v.* Dennis, 133 U. S. 514 (1889): "It matters not by whom the claim may have been presented to the Commission. That body possessed no authority to consider any claims against the Government of either the United States or of France, except as held, both at the time of their presentation and of judgment . . . by citizens of the other country."

[12] "Binding" only in the sense that it bound in default of an agreement to the contrary, not in the sense that it could not have been modified by express international agreement.

[13] P. 152.

appeared in the treatment of the subordinate question concerning the period within which the continuity should be required.

The American Commissioner took the position that even if, as here, the requirement of continuity of the national qualification of the claim beyond the period of its origin must be taken into account, such continuity is necessary only up to the time when the claimant state espouses the claim in accordance with its own free will and choice.

The period of such espousal should accordingly be identical with the period up to which there must be continuity of the nationality of the claim.

This period, the American Commissioner urged, was the time of the coming into force of the Treaty of Berlin, i.e., in accordance with Article III of the treaty, the time of the exchange of ratifications (November 11, 1921).

He motivated this argument by the legal effect of such espousal on the part of the state, which signified a "merger"[14] of the private claim into the national claim. Thus, he argued, the individual claim became a national claim, over which the nation has and holds the right of disposal. This general national character of the claim demands that changes in its specific nationality become irrelevant with regard to the other state and thus are not subject to the examination of the Commission. So it is the espousal, the close connection of the claim which originated in the person of the individual and the national interest as a whole[15] which is decisive in determining the time at which the individual claim must have had a national character.

The American Commissioner urged that the date of the Treaty of Berlin was the time of espousal, because at that time there was legally designated to the German Reich the group of claims for which the American Government would demand compensation on behalf of its nationals.

It should be noted that this treaty is exceptional in that it does not deal in a purely declaratory way with claims derived from international law but constitutively motivates claims which exceed the bounds of international law. But the argumentation of the American Com-

[14] See the remarks in Chapter II. Cf. also Borchard, *Diplomatic Protection*, Sec. 139, p. 356; Sec. 141, p. 360.

[15] The vote of the American Commissioner makes it very clear: "the use of the word 'espousal' indicates, the espousal of a claim by the Government establishes somewhat the same legal relationship as marriage in the days when the property of the wife became the property of the husband and the wife took the name of the husband."

missioner does not place any special emphasis upon this peculiar nature of the treaty, which the American agent too stressed and which we shall discuss below. He contends that with the conclusion of a treaty specifying the various classes of claims, all private relations to the claims "disappeared from an international point of view."

But the conclusion that November 11, 1921, as the day of the exchange of ratifications must thus be considered decisive, is modified by him whenever an earlier date of espousal is suggested on the basis of special circumstances. We refer to cases in which the American Government raised claims against Germany during the period of American neutrality.[16]

The German side replied that the purely internal process whereby a government decides to espouse the claim of a national can not have an international effect, and that in international intercourse only a governmental declaration of intention made to the other state can have such an international effect; that hence the conclusion of the Treaty of Berlin was not a "presentation" of the claims now pending before the Commission.

The German side also argued that the act of presentation, though not unimportant in international law, does not furnish the decisive date; that this date must be seen in the date of the Commission's decision.

This argument was primarily motivated by the fact that it follows naturaliy, and quite apart from any international principle, from the tacit agreement of the two governments on the continuity of national ownership admitted by the American Commissioner and used in another connection in his own decision.

For if such an agreement was in itself derived from the uniform practice of the two governments, accepted by the American Commissioner, and not denied by the German Commissioner, it was logical to treat this practice uniformly in its entirety, unless in one point or another an express deviation could be determined.

Now since the German side had not claimed any deviations from the American practice in this respect, the American mode of dealing with the question of the nationality of the claim had to be considered, though tacitly, as generally desired and approved.

[16] The American Commissioner maintained this position even beyond Decision V and reaffirmed it with special motivation in the case of Maud Thompson de Gennes, Docket No. 2262, p. 213. But the decision of the Umpire, in agreement with the German view, rejected it.

The American practice, described in the General Instructions as "the practice of the Department of State as set forth in these instructions," laid down the express rule that a claim must have been the property of a claimant to the date of its settlement.[17] Hence in regulating the question of continuity of national ownership it not only laid down this rule as such, but as an integral part thereof it specified also the time during which it must continue, so that the accepted tacit agreement had to extend to this same time.

Now since the provision of the American General Instructions quoted in note 17 [*supra*] expressly specifies the day of the settlement of the claim, this day was described by the German side as following from the tacit agreement of the governments and hence as being the decisive day.

On the authority of various decisions of international courts, and of a decision of the United States Supreme Court,[18] the day of settlement was assumed to be the day of the decision, since on that day the duty of the Commission in connection with the claim is ended.

But it seemed necessary to deal with these questions, over and above the arguments taken from the agreement, from the point of view of international law.

[17] Clause 6 of the General Instructions reads: "Moreover, the Government of the United States, as a rule, declines to support claims that have not belonged to the claimants of one of these classes (these are the two classes, to be discussed below, for which the United States promised diplomatic protection) from the date the claim arose to the date of its settlement. Consequently, claims of foreigners who, *after* the claims accrued, became Americans or became entitled to American protection, or claims of Americans or persons entitled to American protection who, *after* the claims accrued, assumed foreign nationality or protection and lost their American nationality or right to American protection, or claims which Americans or persons entitled to American protection have received from aliens by assignment, purchase, succession, or otherwise, or *vice versa*, can not be espoused by the United States."

[18] Cf. the German vote in Decision V, p. 165 [173?]. A different settlement would mean that in cases before the Commission in which aliens, indeed even Germans, became the heirs of American citizens, the German Government would have to give compensation to these aliens, indeed even to its own nationals.

On the other hand it must be remembered that a systematic application of these legal consequences to cases in which German debtors are sued in matters of private law would signify that alien heirs also would lose their standing before the Commission in the case of such a private law claim.

In this connection the contention of the American Commissioner is important, viz., that a distinction may be necessary between cases in which the rightful claimant voluntarily renounces his nationality or his right, and cases in which these consequences have legally ensued without his will.

Accordingly the German vote treated the general points of view at the bottom of the problem.

This vote opposed first of all the view that the purely domestic law whereby the United States adjusts its relations to those nationals whose rights it is ready to espouse, can be decisive in any way for the purely international relation of these claims thus espoused to the other state. It was emphasized that thereby the plaintiff state would, by virtue of its domestic legislation, wield an important influence upon the duration of the national ownership. Furthermore it was pointed out that the theory of the merging power of the state espousal (the merger of the individual claim in the state claim), which was conceivable in the case of ordinary injury of individuals arising solely from the violation of international principles, could hardly be applied to categories of claims as presented to the Commission first in the form of claims of private law creditors, and second in the form of claims wherein the injury of private rights by the application of extraordinary war measures is alleged. The complete disappearance of these individual rights in the claim presented by the state is difficult to understand in these cases, it was urged, especially for the American conception of law which is so opposed to every socialistic trend. It is also irreconcilable with the fact that in cases brought before the Commission not only the German private debtor, but to a certain extent the German trustee has retained the power of a direct settlement of the claims with the individual American interests.

In view of the entirely new development of international legal remedies as effected by the treaties of Berlin and Versailles, the theory of a merger is of doubtful value even as regards domestic relations.

The German argument also raised the question whether the internal decision of a government to grant diplomatic protection to a claim could have any external effect. It was emphasized that the nature of intercourse among nations, and the dignity and importance of a discussion between nations require that a measure of one nation can have international significance for the other only if such measure is duly brought to the notice of the other in accordance with the requirements of international law. But in the case of claims derived from the injury of individuals this is done not by espousal but by the presentation of the claims, as the General Instructions of the Department of State (clause 5) declare: "The Government of the United States can interpose effectively through diplomatic channels."

Such presentation—and that too is in keeping with the dignity of

international intercourse—presupposes that all the circumstances are clearly communicated so that the other government may act upon the claim in accordance with law and fact.

But this form of presentation, according to the German view, can be seen only in the filing of the claim before the Commission, since the American Government had rightly left the examination and preparation of the 13,000 odd claims to the American agent,[19] so that the German Government did not become acquainted with the claim in regard to fact, law and amount until the time when it was filed before the Commission. In this connection the exceptional cases for which the American Commissioner wished to reserve a special date because the claims in question had been pressed earlier, may be passed over.

Accordingly the German Commissioner maintained that the espousal of a claim can have international significance only in case such espousal is seen in the presentation to the other state and that only the formal filing of the case before the Commission can be styled such a presentation.[20]

Special objection was raised against considering the conclusion of a treaty such as the Treaty of Berlin as an espousal of claims now filed before the Commission by the American Government, and against recognizing this espousal only in so far as no earlier period seemed more favorable for the American claims.

In this connection it must be repeated that the Treaty of Berlin to a quite unusual extent created the legal basis whereupon the American claims rest. Through this treaty—and through the many provisions of the Treaty of Versailles incorporated by it—certain general categories of rights (reparation claims proper, neutrality claims in the sense of Decision I, and exceptional war measure claims) were created, with-

[19] Professor Borchard, in his summary of the decisions of the Commission, even took the position that—deviating from the importance of a claim presented to another government through diplomatic channels—the filing of a claim is not necessarily an espousal thereof by the plaintiff state because in the establishment of a claims commission it had always been the custom to present also doubtful claims with which the government did not identify itself, *American Journal of International Law*, 1926, p. 73. This position is not without justification in the light of the procedure of the German American Claims Commission. But it is another question whether the existing practice of presenting doubtful and clearly unjustified claims had not better be abandoned or restricted, especially since it is one government which is acting against another.

[20] Cf. also clause 5 of the General Instructions: "Unless . . . the claimant can bring himself within one of these classes of claimants, the Government can not undertake to present his claim to a foreign Government."

out even the mention or formulation of a single individual claim. And these categories of rights—so far as the rights derived from the Treaty of Versailles are concerned—are only created conditionally, so that it depended upon a further decision of the American Government, which had to be announced to the German Government, whether and to what extent it would avail itself of these rights. The Treaty of Berlin (Art. II) states expressly: "The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty." Accordingly it leaves open the actual application of the rights granted by the treaty, and in fact the United States actually did not avail itself of all its treaty rights, leaving pension claims, for instance, unpresented. The conclusion of the treaty, so far as American claims are concerned, is merely a "preparatory act" in this connection, and can never be regarded as an espousal in the sense of a presentation of the claims.

The summary formulation of the American claims, as contained in the Knox-Porter Resolution embodied in the Treaty of Berlin, conforms, so far as our present question is concerned, to the usual version found in treaties which list claims. But precisely such treaties have prompted international tribunals to apply the principle of the continuity of ownership until the day of settlement.

A contradiction was also found in the fact that here the text of the Berlin treaty and the Knox-Porter Resolution were to be given a constitutive force for this question, while at the same time the position of the American agent that by virtue of the identical text the requirement of original national ownership was removed, met with unanimous rejection on the part of the Commission.

The American agent had pointed to Article 5 of the Knox-Porter Resolution, wherein the liability of German property for all American claims is stated, and at the same time the categories of these claims are designated in what the German side calls an enumerative and the American side a constitutive form, and limited in such a way that claims for losses shall accrue to all those who "owe permanent allegiance" to the United States. The American side deduced from this that it was necessary and also sufficient for the claimant to have had American nationality at the time of the approval of the resolution by the President of the United States—a deduction which was of great importance for the extent of the German obligation in view of the subsequent naturalization of many persons who had not been American citizens.

This interpretation was contested by the German side because the use of the present tense of the verb "owe" was apparently prompted by stylistic and not by legislative reasons, the purpose of the clause being to make the word "national" include all those enjoying American protection. But a settlement of the question here raised was not offered by this provision, according to the German view.

Hence the vote of the German Commissioner stated that in agreement with the practice of the Department of State, and with the decisions of international tribunals and of the Supreme Court of the United States, the nationality of the claim must not only have been clear at the time of the origin of the claim, but that the continuity of such nationality must be maintained until the day of the decision, so that all facts of legal consequence for the decision of this question of nationality brought to the knowledge of the Commission up to that time are to be considered in rendering the decision.

The decision of the Umpire concurred with the view of the American Commissioner, but for reasons which differed radically.

Leaving the question of time and effect of an espousal, i.e., the governmental espousal of a claim, in its legal, external effect undecided, he bases his decision exclusively upon the content and text of the Treaty of Berlin.

In an interesting and noteworthy manner he discusses first the theory of continuous national ownership of a claim and its internal justification. In this he sees not so much a legal principle as a frequent but not binding practice, the importance of which he finds in the formal validity of the claim rather than in its material justification.

The decision proper is then based upon the fact—recognized by both Commissioners—that the international custom is subject to modification by treaty, and then states that such modification was effected in this case by the text of the Knox-Porter Resolution embodied in the Treaty of Berlin.

The rights mentioned in this resolution become a binding obligation for Germany with the coming into force of the treaty. Thereby they become, so far as Germany is concerned, indelibly impressed with American nationality.

Obviously it is the constitutive significance of the Treaty of Berlin from which this effect is derived. For it is especially emphasized that all German obligations "are merged in and fixed by the Treaty."

Thereby the duty of the Commission is limited to the question whether a given claim comes under the provisions of the treaty.

Now since Germany had bound herself to make good all injuries which American nationals had suffered, and since this obligation became absolute when the treaty went into force, the only point of time which could come into question beside the time of the origin of the injury was that of the coming into force of the treaty.[21] This was the line of reasoning employed by the Umpire.

In this way the position stated by the Umpire, in his introductory remarks, that continuous national ownership is not a part of material law but a question of formal admissibility (seen from the right of the plaintiff) or of formal competency (seen from the authority of the Commission), is deserted since the question of the material justification of the claim is directed at the time of the coming into force of the treaty.

The decision is also surprising in that it does not exclude the principle of continuous ownership, the justification of which is first questioned in a nice argument, but applies it and in reality considers the mutual desire to conclude a treaty as being decisive only for the period during which the ownership is to be effective.

There is no detailed discussion as to what extent the text of the Treaty of Berlin under this construction reveals an intention to modify existing legal practices—an intention which is recognizable and which is recognized by Germany.

A further discussion would have been all the more welcome here inasmuch as the decision does not show wherein the special deviations in the formulation of the treaty are to be found which distinguish this case from those treated by other commissions, and decided in the spirit of the German interpretation.

In deference to the wish of both Commissioners, a few special classes of claims were reserved in this decision for special treatment. Brief mention thereof seems desirable in view of their legal interest.

In the first place we mention the treatment of claims lodged by the inhabitants of the formerly Danish islands of St. Thomas, the Virgin Islands, which in January 1917, had by purchase passed into the possession of the United States.

The American agent had taken the view that even in so far as these claims had arisen prior to January 1917, they came under the Treaty of Berlin, since at the time of the approval of the Knox-Porter Resolution by the President (July 2, 1921) the injured parties owed permanent

[21] Thereby all changes of nationality undergone *subsequently* by the claim are irrelevant. Thus for instance the heirs of an American who died in the spring of 1923 receive the compensation accruing to the testator, though they are all Russians.

allegiance to the United States. This view was unanimously rejected in the Commission since acts of Germany against the nationals of a state not enjoying the special rights of the treaties of Berlin and Versailles can only be judged in accordance with international law. It was doubtful whether the United States would have been competent to press claims which had arisen under international aspects. Since acts directed against a Danish national could injure only the Danish and not the American nation, the requirement of original national ownership did not exist per se if the United States presented this claim. On the other hand, Denmark was probably no longer entitled to press such a claim under the principle of the continuity of national ownership. Hence the question arose whether under these circumstances the United States, as the universal successor of Denmark for the islands in question, was competent. The question was not formally decided.

A further question held open concerned the rights of non-American seamen engaged on American vessels for whom there existed nationally fixed rules for temporary international protection. Later it was decided in Germany's favor in the case of Edward A. Hilson (Docket No. 26, p. 231). The decision is based upon the text of the Treaty of Berlin and is hardly of general interest.

Of special importance however was the further question how claims were to be treated which after their origin but before the stipulated time passed partially into the possession of non-American nationals. In so far as a part of the original claim had remained in American hands, e.g., in claims for damaged property, where perhaps a co-proprietor had foreign heirs, there was no difference of opinion concerning the remaining American portion.

But the American side expanded the concept of the remaining American interest to include far different cases. The points of view here advocated are explained primarily by the American contention that every loss of an American is as such subject to compensation (cf. Chapter VIII).

According to this theory every beneficiary interest of an American entitled to protection would be sufficient to make his loss subject to compensation.

The mortgagee was to be entitled to compensation in case the damaged or destroyed property, originally American, had devolved upon an alien. The purely obligatory creditors of an American were likewise to be so entitled if and in so far as through the devolution of the claims of their American debtor upon an alien their obligatory claims

against the debtor remained uncovered. Indeed, even for state inheritance taxes remaining uncovered for such reasons, the possibility of the subsistence of the original claim was to be reserved.

These consequences show how the principle of nationality of a claim is weakened almost to insignificance, if it is one-sidedly opposed by the axiom formulated by the American side, whereby decisive importance is attached to the requirement that the loss, i.e., the injury following the act, must have affected an American.

The conflict of the two theories was most sharply expressed in Decision VII, whose far-reaching findings were based upon the claims of the American charterer of the steamer *Vinland*. The *Vinland* was the property of a Norwegian shipper and was rightfully sunk according to the express conclusion of the Umpire. Yet, under certain modalities deviating from the construction of the claim, it was decided that the American was entitled to compensation in accordance with the Treaty of Berlin.

But the question of the possible justification of such a claim, whether under the Treaty of Berlin or in accordance with international law, is so closely connected with the question of causal relation between cause and consequence of the injury that we must refer the reader to the remarks in Chapter VIII below.

The case of Mary Barchard Williams, Docket No. 594, page 219 [221] of the Decisions, concerns the interpretation of American law. The decision is not without general interest.

The claimant, a born American, had become a British subject by virtue of her marriage with the British national, Edmond E. Barchard, who lost his life on the *Lusitania*. The claimant, who had meanwhile remarried (an American), had her legal domicile in the United States at the time of the sinking of the *Lusitania*.

She made a claim for the injury suffered through the loss of her first husband, basing it upon a provision of the laws of the United States of March 2, 1907, whereby an American woman, in ceasing to be the wife of an alien, has the right to resume her American nationality; this may be done, if she lives abroad, by registering within a year at the American consulate, or if she resides in the United States, by continuing to reside therein.

According to the German interpretation, this right enjoyed by the claimant had no effect upon the circumstance that at the moment of her husband's death she too was a British subject, and hence not a national in the sense of the Treaty of Berlin.

But the decision of the Umpire rejected this argument because the claimant, domiciled in the United States, had become an American again *eo instanti* through the death of her husband. Accordingly her claim, the legal construction of which is treated more in detail under the Lusitania claims,[22] was regarded as being of American origin and entitled to espousal.

[22] See Chapter V below.

CHAPTER V

EXTENT OF THE OBLIGATION TO RENDER COMPENSATION IN CASE OF DEATH AND INJURY (LUSITANIA CASES)[1]

The extraordinary importance of the Lusitania case in American public opinion made it natural that the claims growing out of it were among the first to be presented to the Commission.

This is not the place to discuss the reasons why the Lusitania claims were and still are uppermost in the American mind. It will suffice to remind the reader that it was primarily these claims which prompted the United States to insist upon the inclusion of paragraph 4 of Annex 1 to Article 298 of the Treaty of Versailles. The provision which speaks very generally of claims based upon "acts committed . . . since July 31, 1914, and before that Allied or Associated Power entered into the war" has often been referred to briefly as the "Lusitania clause." And even now while these lines are being written (late in 1924) we find in writings dealing with the American war claims and with the German obligations, a discussion of the American "Lusitania claims and other claims" of the United States against Germany, although the Lusitania claims, ultimately netting less than 2½ millions of dollars and originally estimated at 50 millions, represent an insignificant item in comparison with the total liability of over 170 millions imposed upon Germany.

This American point of view can not be disregarded in judging the principles guiding the Commission in such claims, and especially in their application to individual cases. This explains too the demand of the American agent for additional punitive damages, rejected with detailed motivation by the Commission in the opinion in the Lusitania cases. It explains also the elastic principles for determining damages and their application to the individual case. Hence what was decisive, or at least important for the Lusitania cases in view of the circumstances, should therefore, in so far as the amount of the awards is concerned, not be generalized.

[1] The decisions touched upon in this chapter are the Opinion in the Lusitania Cases, pp. 17 *et seq.*, and Decision VI (dealing with claims of American nationals for damages growing out of the deaths of aliens), p. 195.

But the leading points of view used in the decisions were utilized in all similar cases, and may therefore claim a general interest.

Since in principle the German liability was determined both in accordance with the German note of February 4, 1916, also mentioned in the decision, and in accordance with Administrative Decision I of the Umpire,[2] the Commission had merely to settle the principles governing the amount of the claim and its determination.

For the solution of this question, two general questions had to be answered: According to what principles of law and method of computation was the claim to be judged? The former question touched the claims arising from cases of death and personal injury, the latter only the claims arising from death.

Apart from the fact that in international acts on the high seas the law of an individual state could not be decisive for the extent of international liability, and apart from the fact that the United States, for example, prior to 1920, had no legal provisions concerning liability for deaths on the high seas, the Commission, in answering the first question, believed that the law of an individual country could not decide the problem of international liability, but that an attempt must be made, by consulting and considering the laws of all civilized nations and general points of view, to determine the expedient norms.[3]

In answering the second question, the Commission decided that not the appraisal of an individual life—perhaps by lump sums—but the damage incurred by the individual claimant making the claim was to be used as a basis. The chosen method of computation was to be applied exclusively, contrary to the wish of the American Commissioner, who quite generally desired to have a minimal sum determined for each death in cases where no damage had arisen for third parties.

In some respects this method was similar to the British. But it differed in the essential point that it was used by the British merely to determine an average damage for every life on the basis of a number of cases, and that this average was then automatically claimed as compensation [4] in every case.

[2] In Decision I it was stated that Germany was liable for all acts, not only those contrary to international law, committed during the period of American neutrality, in so far as an American had suffered injury thereby. Cf. the chapter on neutrality claims.

[3] Cf. the Administration Decision No. II *sub* "Principles governing Commission," p. 7.

[4] The circumstance that the amount of average differed for civilians killed on land and for decedent passengers is irrelevant in this connection.

In some points of view used for the computation of the damage but not in their principle of application, the British method was similar to the norms applied by the Commission, whereby only the effective damage of the individual case was to be made good.

Both methods have been applied by international tribunals. The powers participating in computing the reparations at Paris have, as far as is known, all used a general appraisal of life as the basis for estimating their damages and have thus used in effect the method applied in England.

The material consequence of the method used by the Commission was that every case was to be judged and decided in accordance with its special circumstances. The formal consequence was that not the heirs as such, nor the estate (pursuant to American law, which deviates considerably from the German point of view), but only the actually injured heirs have the right to raise a claim.

In the course of the proceedings, it appeared that this formal consequence was given a different interpretation by the German side from that given it by the Americans.

The Germans regarded the chosen method only as a manner of *calculating* the damage, and held that this was expressed in the decision which spoke of "the measure of damages to be applied" and of the remedy "measured by pecuniary standards."[5]

The Americans considered it as the recognition of an independent right of the third injured party. Hence it was the loss suffered by the third party, not the loss of life which was treated as a claim.

The practical difference between these constructions is that under the American interpretation, the American relations of a non-American would also be entitled to compensation, because the loss entitling to compensation originated directly in the person of the American relation injured in his *rights*, while under the German interpretation the death itself was the sole and decisive cause of injury, so that the loss of the life of a non-American did not represent a loss vested with American nationality (which is the prerequisite for every claim coming before the Commission).

This question, touching the basic principles of the requirement of nationality, was discussed in detail in the votes of the two Commissioners on Decision VI. We merely refer thereto.

The Umpire maintains that, according to the provisions of the

[5] Cf. also Life Insurance Decision, p. 116.

treaties of Berlin and Versailles, the damage suffered by an American and traceable directly to a German act must be repaired.

In this, the act committed against the person of the decedent is not considered the original cause of the damage; this is seen in the damage suffered by the person of the third party, namely, the relative. The original damage is not the death of X, but the damage to the property of Y, and upon this act the principle of the nationality of the claim is to be applied.

We shall revert to this construction in connection with Germany's liability for property damage (cf. Chapter VIII).[6]

The principles for the compensation itself, as formulated in the opinion in the Lusitania cases, partially exceed the German provisions for compensation in case of death. In fact, the German provisions are exceeded by those of most nations.

Especially the idea of compensation for mental suffering, as also that of compensation for moral and spiritual prejudice as a result of losing the care of a husband or of parents, with its estimation of mental suffering in dollars and cents, is foreign to German concepts of law. Anglo-American law is based upon a different theory in this respect.

In another point, the subsequent application of the principle that there existed a difference between the German and the American conceptions led to an unexpected though financially insignificant extension of Germany's liability. It appeared that the American conception of dependency, as applied in clauses 2 and 3 of Annex 1 *sub* Article 244 of the Treaty of Versailles, went beyond the German conception. For among the rights to contributions[7] derived from such dependency there were also included such contributions as had been made voluntarily by the decedent, e.g., pin money allowed by a wealthy father; gifts of a son to his mother, etc.

In connection with the far-reaching American conception, the Umpire treated also such relations of contribution as coming under the definition of dependency, or of contributions resulting therefrom, and took them into account in his decisions.

[6] The special provisions of the Treaty of Versailles, especially clauses 2 and 3 of Annex 1 *sub* Art. 244, were also invoked in answering the question whether the claim for an injury abates when the injured party dies prior to the decision. The question is treated differently in the different states of the Union. It was answered affirmatively by the Anglo-German arbitral court. The Umpire answered it negatively, especially with reference to the aforementioned provisions of the Treaty of Versailles.

[7] "The amounts . . . which the decedent, had he not been killed, would probably have contributed to the claimant."

For the rest, the application of the rules may be regarded as more important than the rules themselves. A brief discussion of this application in the Commission may serve as the best commentary thereon.

In the first place, the rules were never applied mechanically or cumulatively alone; they were treated merely as more or less binding principles in judging the individual case justly and objectively.

In so judging, the Commission used not merely the circumstances as they existed at the time of the act but considered also later circumstances which had been brought to the attention of the Commission. Thus in case a widow, dependent upon her husband, had deceased prior to the decision, not the entire alimony claim computable on the basis of the rules at the time of the husband's death, but only that part of the claim extending up to the time of the widow's death was considered in the decision. Likewise the remarriage of a widow, although contrary to the position of the German agent this act was not considered as absolutely excluding further claims, was taken into account to such an extent that, e.g., in case the second husband was so wealthy that the future of his wife seemed assured, the claims extending beyond the time of the remarriage were dismissed.

On the other hand, in harmony with this procedure, aged and needy people who had depended upon the support of the deceased, whose normal period of life had already expired in accordance with the Life Expectancy Tables which were used, were granted a competency over and above the normal period of life if it could be proved that they were still living at the time of the decision. This further support was computed on the basis of the probable duration of life of the claimants at the time of the decision.

In this connection, the question arose whether by analogy the date of the decision should not be used generally in computing the probable duration of life of surviving claimants. This question was decided by implication to the effect that the Commission, apart from the forementioned exceptional cases, computed the probable duration of life of surviving claimants from the day of the death of the relative in question.

In appraising the pecuniary amount of the injury caused by the death, not the full probable duration of life of the decedent was used, but the probable duration of his earning capacity, as suggested by the probable duration of his life, was so estimated that an average point between sixty and sixty-five years, depending upon his vocation, was determined as a limit.

Furthermore, a considerable portion of the husband's income, the

amount depending upon the individual circumstances (30–50%) was deducted as being for the husband's own use. Also all increases in salary, though probable, were disregarded, above all on account of the speculative element connected with the question of the possibility or probability of such increases.

On the other hand, in opposition to the German view, the income accruing, e.g., from the occupation of the deceased father was taken into account even if the future of the family was assured by a large estate. In such cases, the Umpire distinguished between income accruing from work and income accruing from capital, and awarded a compensation for the loss of the fruits of the labor.[8]

To this extent, the generally observed principle that compensation for chances of inheritance which would have existed had the decedent continued to live and increased his fortune should be rejected, was not observed.

If surviving children were involved, it was assumed that they could have received support up to the time of their majority, or at most until their twenty-fifth year. But in keeping with the American theory of dependency and contribution already discussed, the claim was not limited to what was necessary for life, and to cases in which according to German law there was an admissible claim for maintenance.

But compensation for the loss of voluntary contributions was denied in case the claimants had inherited so much as a result of the death that the income from the inheritance was equal to the contributions. In this connection the insurance sums accruing to the claimants through the death were also taken into account.[9]

In agreement with the rules of the Commission, compensation for mental suffering, loss of care, education and supervision was considered in addition to the above points of view which belong more to the sphere of compensation for material losses.

[8] The claim of the heirs of Vanderbilt (Docket No. 2187) was rejected because "the producing power, if any, of the decedent is not disclosed by the record."

[9] In Decision No. 591 (claim of widow Stone) on the claims of the widow, two sons and a daughter arising from the death of the husband and father, it is stated:

"To the extent that contributions by the decedent made during his life and those which he would probably have made to claimants but for Germany's act causing his death were the fruits of the personal efforts of the decedent, the claimants have suffered pecuniary damages which Germany is obligated to pay. But to the extent that such actual or probable contributions were derived as income from the estate of the decedent, which vested in the claimants on his death and yielded to the claimants the same income as it yielded to decedent during his life, the claimants have suffered no pecuniary damages."

Compensation for mental suffering was restricted to direct ascendents and descendents of the decedent, but in cases where a considerable number of children made individual claims, awards were inevitable which ran counter to German concepts of law. Such claims on the part of grandparents were denied.

The question whether compensation for this mental suffering was to be computed uniformly, without regard to the wealth of the claimant, in cases of similar relationship and under similar circumstances, or whether the mental suffering was to be estimated variously depending upon the wealth of the parties concerned, led to detailed discussions in the Commission. The Umpire decided that the mental suffering per se, independent of the wealth of the party concerned and particularly in the case of impecunious circumstances, must be appraised very liberally, but that the differences in circumstances gave the parties concerned a psychologically different conception of the value of the dollar, so that the amount of compensation depends upon the pecuniary circumstances of the claimant.

In one special case, in which the widow and children enjoyed unusually favorable circumstances, no compensation for mental suffering was awarded because in the given instance any reasonably possible compensation would have seemed inconsiderable and would not have fulfilled its ethical purpose of compensation. But this entire phase of compensation, including compensation for loss of care, education and supervision, was stressed only when material factors for computing injuries were non-existent or insufficient. If there were means of computing material injury, the amount thus attained was increased. But generally compensation based upon mental suffering became an important factor only in the absence of other factors or under special circumstances.

Finally the question raised by the American Commissioner whether the considerable depreciation of the dollar since 1915 should not be taken into account, was answered negatively.

In fact it was not overlooked that the Commission had to rely upon the one-sided, though sworn statements of the claimants and their witnesses, and that it was impossible under the circumstances to get an unprejudiced and clear solution of each individual case.

This applied especially to claims deriving from injuries, in which fantastic neurosis sometimes played an undeniable part. In such cases it was difficult to solve the problem even by inviting the testimony of other physicians, since it is not easy even for a physician to

determine the facts in cases involving nervous, rheumatic and similar effects.

It was inevitable that these factors, as well as the aforementioned American attitude toward the Lusitania case, were to Germany's disadvantage in estimating Germany's obligation, so that the compensation granted for the Lusitania cases considerably exceeded the sums used as a basis for the reparation computations in Europe.

Nevertheless, in examining the first fifty-three Lusitania claims, a non-binding agreement was reached in the Commission for most cases (with the exception of several unusually high compensations), but this agreement could not be carried out because the American Commissioner finally demanded a considerable increase of these sums. The decisions ultimately rendered by the Umpire rested, on the average, upon the basis established in the joint deliberations.

CHAPTER VI

CLAIMS OF LIFE INSURANCE COMPANIES

The question touched in Chapter V concerning the extent of liability in the case of death and injury of non-Americans, in which person a claim is to be considered as having arisen, was again discussed in a different legal connection in the decision on the claims of American life insurance companies.

In the course of the World War these companies naturally had to pay out life insurance sums in numerous cases in which death had been caused by the war.

They felt that they had good claims against the German Reich for these "prematurely" paid sums.

In order to press them, the cases which seemed clearest according to American conceptions (where American nationals whose lives were insured with the companies, had perished on the *Lusitania*) were taken up first.

But the fundamental motivation of the claims, in order to be successful, had to lead to a more general liability with respect to the companies, and accordingly the latter had in due time filed all their claims as a whole.

The uniform basis was the plea that a life insurance policy is "property" and consequently entitled to protection in accordance with the treaties of Versailles and Berlin. "A contract of life insurance is property and has a value from every standpoint," the American memorial contends (p. 116).

Now since the specially pressed Lusitania claims are neutrality claims in the sense of Decision I and since, in order to qualify such claims legally, reference must be had to the provisions of Annex 1 *sub* Article 244 in the restriction made by Decision I, applicable in the first place to reparation claims proper,[1] the *sedes materiae* of the claim is clause 9 of the said annex.

[1] See also p. 130, Life Insurance Decision: "This provision of the Treaty [the reference is to par. 4 of the Annex *sub* Art. 298] does not define the 'claims' referred to, which are obviously in the nature of reparation claims. But other provisions of this same Treaty do enumerate the categories of reparation claims arising during belligerency which Germany undertakes to pay as a condition of peace, and these may be looked to in determining the nature of the reparation 'claims' here dealt with arising during neutrality, which Germany likewise undertakes to pay."

The official text of this clause reads as follows: "Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, . . . which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war."

Since in the case of this provision, taken from the Treaty of Versailles, only the English and French texts, and not the German text, are authentic, the American argumentation proceeded from the American conception of property.

In accordance therewith the life insurance contract is *property*, for the right to the premium is actionable, and hence it is entitled to protection.

The value of this property is twofold: (1) the present worth in dollars (which are property) of the future premiums which would have been received under the contract had it matured in due course (p. 116 of the writ), and (2) the good-will of the company, realizable by sale and established by the contracted insurance.

The loss which this property suffers arises from the effects of the premature death of the insured.

A death is described as "premature" when the insured dies before the time of his probable duration of life existing at the consummation of the insurance, and determined in accordance with scientific principles.

The "injury" caused by such premature death is found to lie in the loss of future premiums payable by the insured, and in the present value of the loss of interest suffered by the company as a result of the fact that it must pay the policy not from premiums due in future, but from its other assets, thus losing the usufruct of these other funds.

If, therefore, all the prerequisites are here established whereby Germany, according to the provisions of the treaties of Berlin and Versailles, is liable for the injuries caused by the loss of a human life, then such is the argument—this liability also includes the above formulated injury suffered by the insurance companies.

But the effect of such a death upon the financial situation of the company signifies all the more a financial loss if (this is the special argument used in the Lusitania cases) the cause for the injury lies outside the pale of risks considered by the company. Since this is the case in so extraordinary an event as the sinking of the *Lusitania* was, the

company's obligations arising from this event could not be covered by reserves not intended for this risk.

Hence the sinking itself is described as a "deviation from the average," "for which no provision had been made," and as "interference with the operation of the law of averages."

Against this latter part of the argument derived from the special *unforeseeable* nature of the cause of death, the German defense, which dealt with all the problems in great detail, opposed the twofold argument that it can not be a question of the *foreseeability* of the individual risk, and that the plea of *prematureness* of the individual death as such is not sufficient as a basis for construing a claim.

On the first point it was stated that the normal life insurance risk assumed by the companies was not based upon the addition of various risks expressly contemplated by the companies, but includes every risk not expressly excluded, so that for the Lusitania cases the fact that the war risk was not excluded for non-combatants in the policies involves the covery of this obligation from the legal reserves at the time the obligation arises.

Hence, it was argued, if it is possible to speak of a reparable "loss" at all, such a loss may be regarded as having occurred only in case the entire covery provided for the entire insurance group concerned were insufficient, i.e., in case the figures for total mortality underlying the computation of the reserve were exceeded.

In the first place, the Commission studied this portion of the arguments and agreed unanimously that on the one hand the American position that the cause of death—the sinking of the *Lusitania*—had not been taken "in contemplation" by the companies and that therefore the payment of the insurance signified a loss to the companies, and on the other hand the German position that since the cause of death, though not in its actual details, yet in its legal qualification comes under the assumed risk, there was no loss involved, were both inadequate. The Commission considered that the death of the insured caused by the sinking of the *Lusitania* was premature since it was caused by special external factors and that hence the payments caused by the catastrophe represented a premature burdening of the companies and hence a loss for them, and that on the other hand the question whether the companies provided for this loss in their reserves was only an internal one, relevant for the financial status of the company—*lucrum cessans* when contemplated and covered by reserves, and *damnum emergens* when without cover.

This rejection of the American construction derived from the *unforeseeability* of the injury could be construed as a failure by this group of claimants for the special motivation of the Lusitania claims. But if the legal motivation of the claims had been accepted in other respects, it cleared the road for the claims of the insurance companies as a whole.

For if the requirement of unforeseeability were dropped, the American theory derived from the conception of *property* might bring it about that all such cases too would be considered subject to indemnity in which the risk was doubtless foreseen, i.e., all cases in which combatants insured against war risk were killed on the battlefield but in which such killing was premature.

In so far as the other legal prerequisites of the claim are to be regarded as fulfilled, the sphere of possible claims was thus broadened to such cases in which American companies had insured soldiers, not only American but also British, French, and even German soldiers, who had been killed. These cases were numerous because several American companies had carried on an extensive business in Europe, especially in Germany. In fact almost two thousand claims of this type were filed before the Commission.

If we consider that on the basis of international principles Decision II (p. 8) and similarly Decision V dealing in detail with the question of nationality provide that it is one of the prerequisites of indemnity for a loss that it must have affected an American, such possibilities seem at first surprising. But they are logical, for the situation in this case would be that the loss affected the property of the American company as such directly and originally, and is independent of the person and nationality of the decedent.

The far-reaching significance of this point of view, derived from a quite general argument, for the legal relations of the nations is apparent.

The possibility of friction is extraordinarily increased, while the possibility of amicable settlement is extraordinarily diminished. For how can a state undertake to settle a dispute with another state amicably or by arbitration when the compensation claims possibly arising from the effects of the act upon other nations elude computation and survey? [2]

The question to be decided here, viz., whether a life insurance company can derive for itself an original legal claim from the international liability of a state for a death, acquires a significance transcending the

[2] Cf. the Antioquia case cited in note 14 of Chapter VIII.

limits of the treaties of Berlin and Versailles, all the more so since the contractual provisions cited for purposes of motivation represent—certainly so far as the arguments of the American agent are concerned—no essential deviations from the rules and modes of expression generally recognized in international dealings.

"Injury to persons or property" is in the international intercourse of the nations the almost universally recognized prerequisite for international intervention.[3] And "acts committed against the persons or property of citizens" are accordingly the causes for such intervention.

Hence the "claims arising out" of such acts are made the subject of international arbitral settlement.[4]

Indeed we find phraseology which seems to cover the American point of view entirely.

Thus the Samoa Treaty between the United States and Great Britain of November 7, 1899, speaks of "claims . . . for compensation on account of losses which . . . they have suffered." And likewise the new instructions of January 30, 1920, prepared by the United States Department of State as a basis for the claims of American nationals against foreign governments resulting from the recent war, speak of: "claims . . . for loss or injury (1) which was suffered . . . by its citizens, and (2) for which a foreign Government . . . was responsible."

And both phrases appear together in Decision I of the Umpire, wherein Germany is declared responsible for "all losses, damages or injuries to them [i.e., American nationals], including losses, damages, or injuries to their property wherever situated."

Now since the American expression "property" is legally of greater significance and in its broader sense much more far-reaching than the German "*Eigentum*," which is used in the German version of the Berlin treaty as corresponding to "property," [5] it is easy to see how the American conception tends to treat as reparable every material diminution of wealth, provided the liability is in other respects apparent.

[3] Thus the treaty between the United States and Mexico of July 4, 1868: "claims . . . arising from injuries to their persons or property."

[4] Thus the well known Treaty of Washington of May 8, 1871 [Art. XII], between the United States and Great Britain provides for the arbitral settlement of "all claims . . . arising out of acts committed against the persons or property of citizens." Similarly the treaty between the United States and Chile of August 7, 1892.

[5] It is doubtful whether the Germans were in every case aware of the full significance of some of the phrases used. In Art. 232, par. 2 of the Treaty of Versailles the word property is rendered as "*Gut*"; in Annex 1, clause 9, *sub* Art. 242 as "*Eigentum*," and in the Knox-Porter Resolution again as "*Eigentum*."

The resulting problem with its far-reaching consequences will be treated below in Chapter VIII. Here we refer only to the general connections of the question of justifiability of the life insurance claims.

In the Commission, the arguments of each of the three members were different in the matter of reaching the decision which was rendered by the Umpire because the Commissioners disagreed. His decision was in the sense of a denial of the claims. As for the details, we may refer to the minute motivations which all three members gave to their opinions.

The decision of the two American members places the interpretation of the special contractual provisions here involved in the foreground.

The American Commissioner starts out from the principles stated in the Lusitania case and deduces from the *direct* claim awarded to the claimants in that case that the claims of the insurance companies for their lost premiums are also justified.

The Umpire did not follow this train of thought.

His decision is primarily based upon the special contractual provisions, especially clauses 2 and 3 of Annex 1 *sub* Article 244,[6] and its argument rests upon the fact (p.130) that on the one hand the claims arising during the period of American neutrality are to be treated analogously to the reparation claims proper, and that on the other hand for these reparation claims the special mention of the claims of surviving dependents limits the rights of third parties derived from deaths to these surviving dependents.

But the decision of the Umpire acquires a more general significance in that, in its second part, it deals with the question, discussed in detail in the preparatory memoranda of the agents, of the causal connection between the injury here pressed and the cause of the injury.

The decision denies this connection, seeing, in agreement with the position taken by the German agent, only a remote consequence of the injury in the loss of the insurance companies.[7]

[6] Clause 2 reads as follows: "Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation, of exposure at sea or of being forced to labour), wherever arising, and to the surviving dependents of such victims."

Clause 3 reads as follows: "Damage caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims of all acts injurious to health or capacity to work, or to honour, as well as to the surviving dependents of such victims."

[7] On p. 139 of the decision, the argumentation of the Umpire is supported by citing cases in American practice in which similar claims were rejected because they were remote consequences.

The decision here reverts to Decision II and connects the ideas of proximate cause or proximate consequence and remote cause or remote consequence with the point of view of normal consequence (p. 133) on the one hand, and consequence that no one could possibly foresee (p. 137) on the other, stating that the "*intent* of disturbing or destroying such contractual relations" must be a prerequisite of liability. Thereby this principle recognized in the laws of all civilized nations is represented in the light of causal connection and logically brought into the trend of the decision.[8]

The German Commissioner based his argument on the interpretation of the idea of "property," both from the point of view of international law and from that of the provisions of the treaties of Berlin and Versailles.

For the work of the Commission, it seemed necessary in the first place to clarify this idea in the sense of the treaty, since this was of decisive importance for many other cases too.[9]

But at the same time, the broader background of the question in relation to international law had to be stressed.

The right of the individual to protection, as it is regulated and vouchsafed in international relations by national legislation—apart from the varying nature of protection conditioned thereby—can not claim the same right in international intercourse.

The international protection of the individual requires that the claim of an individual national be espoused and represented by the state as a whole, that is by the nation as such.[10] It further requires that it be asserted against another nation as such.

That is a procedure which in seriousness and importance goes far beyond the *modus procedendi* under which the individual in a private law litigation invokes the protection of the courts, and which must depend upon clear rules if it is not to involve the nations in their relations to each other in misunderstandings and danger. The first of these rules must be that visible, recognized values needing protection, i.e., persons or tangible property, were the subject of the alleged violation.

The honor and respect of a nation are affected by the alleged violation. But the mere willingness to assume such an affront in case purely contractual rights of a national with respect to persons or property are *injured*, is tantamount to degrading the dignity of international legal protection, and to menacing the relations of the nations to one another needlessly.

[8] As a consequence of the decision, other similar claims arising out of contract injuries, e.g., deduced from the death of employees or partners, were rejected.

[9] See Chapters VII and VIII.

[10] See Chapter II.

The German side consequently took the position that in international law only the real property damage and not contract claims of third parties are entitled to reparation.

As the final paragraph of his decision (p. 139) shows, the Umpire consciously left the question of the conception of property undecided.[11] But in the second part of his motivation, he transcended the legal situation as conditioned by the contractual foundations, thus rendering in this section of his remarks a decision of more general and permanent value.

[11] But in Decision VII the Umpire took a detailed stand on this question, so far as it is based upon the interpretation of the treaties of Berlin and Versailles. In the main the decision agreed with the German view.

CHAPTER VII

CLAIMS OF MARINE UNDERWRITERS (SUBROGATION)

The conditions of the World War which will perhaps never occur again, have brought a question to the fore which despite certain relevant decisions, has never really been decided, but which attained considerable importance before the Commission both materially and juridically, namely, the question how far and under what legal conditions the marine underwriter, especially the underwriter in a war on sea, is entitled to file claims for injuries covered by him.

The legal nature of such a claim required special examination, particularly because here again a point of view frequently touched and derived from a principle of nationality is involved.[1]

It is a principle of international law that only an injury suffered by a national of the intervening state in his person or property results in an internationally justified claim for reparation to the state concerned.[2] Thus a claim pressed by the American Government in the matter of British or Swedish property, for instance, would lie beyond the pale of international rules and would not be recognized by the Commission.

An application of this legal principle to insurance claims shows the extent of the question concerning the legal nature of these claims. If the insurer has only a derivative claim for compensation (derived from the right of the party insured), or according to Anglo-American terminology if he has this claim only by virtue of subrogation, the claim, which in its origin did not affect an American national is not justified, provided the insured party himself belonged to another nation, since according to another undisputed international rule the later transfer of the claim to a national is not sufficient justification for its espousal. But if the claim arose directly in the person of the insurer, his status and his nationality are decisive—a conception, the extraordinary significance of which is clear if one considers that thereby every claim derived from a reinsurance concluded by an American as reinsurer, as it is conceivable in the very complicated international reinsurance business in

[1] Cf. Chapters V and VI.

[2] Cf. Decision II, p. 8: "the loss must have been suffered by an American national."

many possible forms, would be justified regardless of the nationality of the reinsurer and the original insured party himself.

Now since both the American legal norms regulating the transfer of property [3] and the nature of American export trade during the war (e.g., by arranging previous payment or of confirmed bank credits) were bound to lead frequently to the transfer of property to the vendee at the time of shipment, and since in many cases the vendee did not have American nationality, they were—certainly so far as the American export trade was concerned—in many cases goods which were not American owned, for which the American insurer had paid and now demanded reparation.

An obligation for reparation in the case of these claims was bound to affect Germany very seriously since the British Government, in the reparations account presented by it, used as a basis the "inward bound trade." Hence, in so far as the commercial relations of Great Britain and America were concerned, the same traffic in goods was used for the British account for which the American insurers now demanded compensation to the extent of the insurance sums paid by them.

The legal questions resulting therefrom became more complicated through the fact that in addition to private claims derived from insurance contracts, such claims on the part of the American Government also were involved, since the American Government, taking account of the economic situation during the war, had conducted, in the Veterans' Bureau, an extension insurance business in the interest of American commerce, and since with regard to these government claims the German liability was regulated differently on the basis of the special provisions of the treaties of Berlin and Versailles than with regard to private claims.

All the resulting questions were exhaustively discussed by the agents in memoranda—on the American side also by the legal advisers of the interested groups.

The American side did not overlook the fact that the principle of subrogation, i.e., the right of the insurer to enter upon the rights of the compensated third party, is recognized in all civilized countries. But over and above this a direct, *original* right of the insurer was claimed and thereupon the claim of the insurer—independent of the nationality of the insured—was based.

The arguments motivating these statements in detail may be summed

[3] According to American law "the transfer of the property is effected by the mutual assent of the parties to the contract of sale." Tiffany, *Law of Sales*, p. 50.

up under the point of view that in any case the insurer is, by virtue of the conclusion of the insurance contract, interested in the fate of the insured article and that this very "interest" represents a property value entitled to protection. This property value is all the more apparent, since at the time of effecting the insurance contract the insurer was entitled to indemnify himself in case of injury, since in other words the *spes recuperandi* forms a part of the insurance contract, an asset to which the insurer was entitled from the start.

The justification of this point of view was also based upon the principles governing the right of constructive total loss and of abandon connected therewith. Attention was called to the retroactive force with which, in such cases, the insurer enters upon the rights of the insured at the time and place of the total loss.[4]

In this relation of the insurer to the insured article a quasi-ownership, a "beneficial right" was detected,[5] the injury of which was a direct injury of the property of the insured and hence justified the claim.

The German side contested these arguments strenuously.

It was stated that even if *per inconcessum* there were a direct property relation of the insurer to the insured article, yet this could not refer to rights of the possibility of which no one had thought at the time of the injury, and which at the time were not and did not become existent. For the fact that in consequence of the lost war Germany could be called to account at all, and what is more, to an extent which was so far-reaching and brushed aside every international restriction, could not be foreseen, especially at the time of the conclusion of the insurance contract.

But the principal argument was directed against the American idea of

[4] Brief on behalf of American Marine Underwriters by Bigham, Englar & Jones, p. 13: "the underwriters succeed to the assured's rights retroactively as of the time and place of the actual destruction" and: "the abandonment . . . related back to the capture, and took its operation and effect from that loss." Clarkson *v.* Phoenix Insurance Co., 9 Johns 1.

[5] The decision of the Supreme Court in the case of Hall *v.* Nashville & Chattanooga R. R., 80 U. S., p. 356, was cited: "In respect to the ownership of the goods and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty."

Since the matter was settled by compromise, the Umpire did not render a formal decision. But his decision on the claims of the life insurance companies contains an interesting sentence (p. 135): "The insurance becomes material only in determining who really suffered the loss. This is because a contract of marine or war-risk insurance is a contract of indemnity ingrafted on and inhering in the property insured."

a purely economic interest on the part of the insurer in the insured object as a property value directly entitled to protection in international intercourse, especially as a right coming under the definition of property in the sense of the treaties. At the same time, for the correct estimation of this economic interest of the insurer, it was stated that the risk was covered by the premiums and that in reality the insurers had suffered no loss, but had realized a substantial profit.

It was recalled that in distributing the lump sums paid by Great Britain in satisfaction of the so-called Alabama claims, American legislation expressly restricted the claims of American insurers to such cases in which the insurer had suffered an effective loss in his business as a whole during the time in question.

From the purely juridical point of view, it was emphasized that a claim even as a matter of theory can not be original and derivative at the same time, as was the case according to the American conception, which expressly recognized the principle of subrogation as being applicable.

With regard to the government claims, it was argued that in the case of these, certainly for the period of American neutrality, the unconditional liability of Germany for every legal and illegal act is not apparent, as witness Decision I which is restricted to private claims, and the Knox-Porter Resolution, Section 5, which mentions only the claims of American nationals.

In judging the legal questions concerned, there was a radical difference of opinion between the two national Commissioners. In the fundamental question of determining the material extent of Germany's liability, the two divergent views were treated in detail in deciding the life insurance claims in the dissenting opinions to which we refer.

Hence the dissenting opinions formulated in this question have a supplementary character. Further elaboration is unnecessary too because meanwhile it proved possible to settle the question of subrogation by compromise.

In his vote the American Commissioner placed the rights of an American national arising from events at the time of American neutrality, and from such at the time of American participation in the war, on the same plane, and in this he is in agreement with the thoughts developed by the Umpire in the Life Insurance Decision, page 130. Starting from the text of clause 9 of Annex 1 *sub* Article 244 wherein "damage in respect of all property" and "damage directly in consequence of hostilities or of any operations of war" are mentioned side by side, he contended

that it was not necessary for the insured object to have been in the possession of an American at the time of the injury, but that it is sufficient if the damage occurred "in respect of all property . . . belonging to any of the Allied or Associated States or their nationals," and that for the rest such an injury on the part of an insured American is a damage "directly in consequence of hostilities or of any operations of war."

Hence, the Umpire said, it was unnecessary to discuss the arguments of the agents derived from the conceptions of subrogation and property.

At the same time the principles thus arrived at were extended by him to all government claims—for the neutrality period on the basis of paragraph 4 of the Annex *sub* Article 298, and for the war period on the basis of the aforesaid clause 9 of Annex 1 *sub* Article 244.

The German side adhered to the exclusively derivative character of the claims of the insurer and pointed to the fact that the circumstance that the rights of all civilized nations recognize the principle of subrogation admits the conclusion that they are not familiar with an original right of the insurer, since otherwise the development of the principle of subrogation would have been quite superfluous.

Likewise, the untenability of the consequences of the American constructions was stressed. For limiting the decision to the question of the pecuniary loss would mean that Germany would be liable for the quite legal sinking of neutral goods in so far as American direct insurance or reinsurance is interested therein; indeed that Germany, which for the American war period is liable even for the war acts of her opponents, is even responsible for the injury suffered by American reinsurers as a result of the sinking of American goods by allies of America—a case which is quite possible in the light of the ramifications of the insurance business through the medium of neutral companies.

But even if the American point of view were recognized on general principles, independently of the special rights here involved, the injury of the property of the national of one nation might give rise to a host of interventions on the part of third states by the circuitous road of covering injuries through insurance and reinsurance companies.

The German side also adhered to the points of view concerning "property" expressed in the vote on the life insurance question.

But finally it was pointed out that if it were really a question of the original loss of the insurer, he would have to deduct the premium received, which he would not be bound to do if he were suing from the

right of the insured since his injury does not represent a property damage diminished by the premium.

In the further negotiations of the Commission, a more economic factor was stressed which became the principal reason for the later compromise.

The American side had computed the maritime injuries in such a way that the individual interested party in every case had to deduct all insurance sums paid to him and that the sums paid by American insurers, and only these, were taken into account, while in the European reparations account the destroyed or damaged values were entered at the nominal value of the damage, i.e., regardless of any insurance sums paid, in particular without the deduction made by the American Government, of the sums paid by the alien insurance companies.

It was clear that this second form of calculation holds more closely to the form of estimating damages which is customary in private law, and the question arose whether the American Government was not entitled, in case its hitherto used method, contested by the German side so far as values were concerned which were not in American possession and were not insured with American companies, actually were rejected by the Commission, to resort to the "European" method, and to utilize the surpluses thus acquired in order to satisfy the contested domestic insurance claims.

The considerations connected with this line of reasoning, of an essentially practical nature, led to the result that the insurance claims, both private and governmental, were regulated by means of a compromise, the American side yielding a point.

The votes of the Commissioners did not, therefore, lead to a formal decision of the Commission, and were not included in the collection of individual decisions.

The position of the Umpire did not become openly manifest as a result of the compromise. But later he had occasion to express himself on the question, and he did so in the same sense as was done by the American Commissioner and the American agent.

In the decision of the three claims—Marine Transport Company, Docket No. 5962 (Schooner *Annie F. Conlon*), William J. Quillin *et al.*, Docket No. 6120 (Schooner *Laura C. Anderson*), and Jeanette Selinger, Docket No. 6287 (Schooner *Mary W. Bowen* and Bark *Carmela*), of April 21, 1926—Volume II, pages 654 *et seq.*—he formulated his stand on the question of the direct property rights of the insurer.

In the three cases mentioned, the sunken vessels were insured in

part by the French Government. The German agent had accordingly contested the liability of Germany to the amount of the French insurance, pursuant to the position taken by the American agent and the American Commissioner in the question of subrogation. Since, in accordance with the decisions of the Commission, the time of the occurrence of the loss was to be decisive for the computation of the damage, the German side figured the French property share in the vessels at the value of the franc on this day, while the American claimants wished the insurance deducted only in the smaller amount in which it had been paid to them in consequence of the subsequent depreciation of the franc long after the occurrence of the loss.

The decision of the Umpire stated that: "At the time of the loss the insurer had a contingent or conditional property interest in the tangible thing destroyed—the schooner—which interest became absolute and fixed upon payment by the insurer."

The amount of the property interest, in accordance with the above definition, and under the influence of the American theory of loss (see Chapter VIII) is fixed at the amount which the French insurer later paid to the insured, converted into dollars. The result is that, though the value of the object at the time of its destruction is decisive for Germany's obligation, Germany can not rely upon the time of destruction in order to evaluate that part for which no American national has a right to enter claim. The decisive question is to what extent the actual ultimate loss of the American claimant was diminished by alien participation. "This loss Germany is obligated to pay under the Treaty of Berlin to the extent—but only to the extent—that it was impressed with American nationality."

Hence—what is most interesting from the point of view of private international law—the insurer has a direct right to compensation if the object insured by him is damaged by an act making another state responsible, and if he has given compensation in accordance with the insurance contract. Thereby the requirement that the act must have been directed against a protectionable object of a citizen of a nation, and hence against the nation, was eliminated. For the direction of the act not against the insurance contract, but against the object covered thereby and being in the possession of a citizen of a third nation, is considered the basis of the obligation with regard to the insured national of another nation.

CHAPTER VIII

THE EXTENT OF GERMANY'S OBLIGATION TO GIVE COMPENSATION FOR DAMAGE IN RESPECT OF PROPERTY—"LOSS" AND CAUSAL CONNECTION

The juxtaposition in the latter part of this title signifies more the treatment of the doctrine, known also to German law, that a causal connection—or an adequate causal connection—must connect cause and effect of an act in order to constitute the responsibility for the effect. It means that out of the logical auxiliary which the doctrine of causality represents for the German legal construction, the American conception of international relations has made an independent factor for establishing justice.

This is based upon the differently developed American point of view which is influenced by political motives.

A comprehension of this difference will contribute much to avoiding misunderstandings in the future formulation of agreements, especially of an arbitral nature, with nations of Anglo-American views.

The following comments and examples will serve to make this clear.

The German construction proceeds from an act to a person or object which is covered externally by the sovereignty of another nation. If the causal connection between this act and the injury inflicted upon the other nation in the person or object concerned is apparent, the obligation of compensation exists.

The American conception places less emphasis upon the direction of the act. If an act is subject to compensation because it is either contrary to international law or entails compensation in accordance with the provisions of international law or of special treaties, without necessarily being contrary to law, it is its economic effect, the loss arising therefrom for the nation in the person or the property of one of its nationals, which justifies a claim, in so far as an adequate causal connection can be determined between cause (act) and effect (loss).

Consequently the German construction, e.g., for the delimitation of liability for reparation claims proper, proceeded from the requirement that the liable act must have been directed against the property of the national concerned. It relied in this upon the decisive provision of

clause 9 of Annex 1 *sub* Article 244, whereby Germany was to be liable for "damage in respect of all property . . . belonging to any of the Allied or Associated States or their nationals," and interpreted this to the effect that the legal ownership, incorporated in the idea of property, of an object by a person and thereby by a state to which this person belonged, conditioned and limited the German liability.

Accordingly the idea of property was fixed and thereupon the justification or non-justification of the claim was tested.

As we have already stated,[1] difficulties arose as a result of the ambiguity of the Anglo-American conception of property. In its narrow sense it corresponds to the German idea (the right of control over physical objects), while in its broader sense it is covered by the idea of "*Vermögen*" (the whole complex of economically tangible values subject to the control of the individual).

From the antecedents and text of the treaties—with regard to the Treaty of Versailles by using the French text and with regard to the Treaty of Berlin, the German text—the German side tried to prove that here the term "property" is used in its narrower sense and includes only tangible things.[2]

Hence the German side rejected liability for all property claims in which the damage or destruction was not based upon an act against the property itself.

The American argument was quite different. Here it was the "loss, damage or injury to . . . persons or property," i.e., the simple fact of the occurrence of loss, damage or injury from which the rightfulness of the claim was deduced.

This justification was delimited solely by the laws of causal connection.

This involves no special deductions derived from the text of the treaties of Versailles and Berlin, which go far beyond the principles of international law in their impositions upon Germany and hence are merely of ephemeral interest; it involves the basically different American point of view.

Here, under the influence of a nationalism glorified by success, wealth, and consistent education, a legal conception is developed which, in its unconsciously imperialistic force, reminds one of the *civis Romanus sum* of antiquity.[3]

[1] See Chapters VI and VII and especially the German vote in Decision No. VII, and the decision on the claims of the life insurance companies, p. 103 of the Decisions.

[2] In Decision VII the Umpire approved this interpretation.

[3] Cf. Andrew D. White: "The famous boast 'I am a Roman citizen,' which was the passport and armor of the Roman in any part of the world gives the idea of what ought to be the claim of the American citizen." Charles A. Beard in *Readings in American Government and Politics*, p. 295.

The very fact that an American national suffers a loss as the result of an act which in itself demands compensation according to international law is justification of the American claim, independent of whether the act was directed against the person of the American national or not.[4]

This view is interestingly carried into effect in the treaties which the United States concluded in 1902, 1905,[5] 1910 and 1914 [6] with sixteen and nineteen Central and South American states, respectively, on the arbitral settlement of pecuniary claims, and in which these claims are broadly designated as "claims for pecuniary loss or damage, which may be presented by their respective citizens."

And this view is in accord with the formulation of the General Claims Convention concluded on September 8, 1923, with Mexico, one of the signatory powers of 1902 and 1910, whereby all claims are settled by arbitration which validate "for losses or damages suffered by persons or by their properties"; and which also validate for all "claims for losses or damages . . . suffered by any corporation, company, association or partnership, in which such citizens have or have had a substantial and bona fide interest," [7] and which finally validate for all "claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice." [8]

[4] Cf. Chapter X. The individual American shareholder is entitled to compensation even if the corporation in which he holds shares is an alien corporation.

[5] The treaty was concluded on Jan. 30, 1902, and proclaimed in 1905.

[6] Concluded on Aug. 11, 1910, proclaimed in 1914.

[7] Cf. the corresponding provision of Section 5 of the Knox-Porter Resolution: "damage . . . to property . . . through the ownership of shares."

[8] Art. 1, Section 1 of the Convention reads as follows: "All claims (except those arising from acts incident to the recent revolutions) against Mexico of citizens of the United States, whether corporations, companies, associations, partnerships or individuals, for losses, or damages suffered by persons or by their properties, and all claims against the United States of America by citizens of Mexico, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties; all claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage

If here in the first part "loss" or "damages suffered by persons or by their properties" is mentioned, this signifies no restriction of the general text of the treaties of 1902 and 1910, since here the term "properties" is meant in its wider significance and includes every property relation, and since every loss or damage, in so far as it is only of a pecuniary nature, must affect such relation and hence represents a "loss or damage to property." In the sequel, the repetition of "by persons or property" is avoided, so that the general version appears once more.

The same tendency is found in the Knox-Porter Resolution, which forms an integral part of the Treaty of Berlin, with its formulation of the claims for "loss, damage, or injury to their persons or property, directly or indirectly."

The underlying thought was stressed by the Umpire in his Decision No. VI, in which the protective right of American nationals is stated most clearly. He said: "The Government of the United States was careful to incorporate in the Treaty of Berlin broad and far-reaching provisions designed to compensate American nationals for all losses, damages, or injuries suffered directly or indirectly by them." [9]

But this intention was not prompted by the idea of imposing upon Germany, as the vanquished nation, a special burden. We are dealing rather with the formulation and assertion of a general conception of the extent of reparative obligation as it is deliberately advocated by the United States.

The consequences of this idea were carried out consistently in the Knox-Porter Resolution. The resolution states expressly that even an American shareholder of a German, Austro-Hungarian, American, or other corporation is entitled to compensation for the loss suffered by his share.[10]

suffered is presented by the claimant to the Commission hereinafter referred to; and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled, as well as any other such claims which may be filed by either Government within the time hereinafter specified, shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity."

[9] Decision VI, p. 209. Cf. also the identical votes of the American Commissioner in Decision VII and in the question of the claims of the life insurance companies, as well as in those of the underwriters and in the claims arising from the death of an alien.

[10] Section 5 of the Knox-Porter Resolution: "loss, damage, or injury to their

Similarly the Umpire in his Decision VII, page 325, where he summarizes the meaning of the Knox-Porter Resolution. He states that American nationals who had an interest in destroyed property and who suffered damage as a result are protected to the extent of their interest, no matter in what capacity they suffered, whether directly or indirectly. And then he adds that thus construed, Section 5 is in keeping with the traditional policy of the American Government to look behind forms and to the substance in discovering and protecting the interests of American nationals. Thus Section 5 was not an extension of the provisions of the Treaty of Versailles but the expression of a principle which the United States wished to apply in interpreting the treaty in so far as no special provisions opposed.

Obviously we are dealing, not with a special claim derived from the Treaty of Berlin, but with the realization of the American conception of international law. As the Umpire says correctly in Decision VII, page 325, the sense of the contractual provisions is not the modification or extension of the doctrine of causal connection, but merely the logical working out of the theory of loss: "The indirectness of loss by American nationals dealt with in section 5 of the resolution refers to the nationality of the corporate or other entity or to the property in which they may have been interested rather than to the absence or remoteness of any causal connection between Germany's conduct and the particular losses complained of." [11]

With the same logic, the consequences of this theory of loss in establishing and motivating the claims presented to the Commission by the American agent are developed.

The point of view which was important according to previous opinion,[12] if not altogether decisive, that through the reparable act the honor and dignity of a nation—in one of its nationals—must be injured in order to justify the espousal on the part of the nation (so important in the relation of the nations to each other) of the claims of its nationals against the other nation, is thereby subordinated. No

persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise." Cf. the Umpire in Decision VII, p. 325.

[11] Cf. Chapter X.

[12] Cf. Decision II: "The enquiry is: Was the United States . . . injured through injury to its national?"

longer the act and its direction against the alien national is the decisive factor, but rather the pecuniary damage which arose therefrom.

A nest of claims of different nations may therefore arise from a single act whereby per se only the national of one nation is affected, and the completeness and uniformity of a settlement of the damage may thereby be made very questionable.[13] [14]

An explanation of these consequences in the light of the individual legal cases discussed below will show clearly what is meant.

On the conception of the aforementioned far-reaching protective right of American citizens were based the claims of those life insurance companies described in Chapter VI which had paid insurance to the survivors of *Lusitania* victims. The loss of the further premiums caused by premature death was conceived as "loss of property" in the broader sense. And not only the American agent but also the American Commissioner in his detailed opinion considered that Germany's obligation to pay indemnity was proved.

The consequence of this conception would have been that Germany

[13] A good example of the complication is Decision VII treated in detail below, whereby the American charterer of a non-American vessel may be entitled to compensation for his "interest."

The arguments of the Umpire leading to this result are not primarily based upon the special provisions of the treaties of Versailles and Berlin, but on established American rule.

It is clear that in so far as Germany has already paid reparation to an enemy or neutral power for the value of a vessel, she is obliged consequently to pay in duplicate to a certain extent.

[14] This is exactly what—e.g., in the case of the vessel *Antioquia*, belonging to an earlier development of the United States—the American Government maintained against a too far-reaching right of protection on the part of its citizens with respect to their interest in alien companies.

The steamer in question belonged to a company domiciled in Colombia, the Compañia Unida de Navegazión por vapor en el Rio Magdalena, the shares of which were mostly in the possession of citizens of the United States; nationals of Germany, Great Britain and Colombia being minority stockholders.

Here the American Government refused to intervene for the American interests. The motivation contains the following sentences: "It may well be that subjects of Great Britain, France, and Russia, are stockholders in our national banks. Such persons may own all the shares except a few necessary to qualify the directors whom they select. Is it to be thought of that each of those powers shall intervene when their subjects consider the bank aggrieved by the operations of this Government? If it were tolerated, suppose England to agree to one mode of adjustment, or one measure of damages, while France should insist upon another, what end is conceivable to the complications that might ensue?"

would have been liable for all sums paid to survivors of persons insured by American companies, including survivors of British and French soldiers, and that—since Germany is also liable, during the period of war, i.e., after April 7, 1917, for injuries caused by the enemy powers in consequence of hostilities or of any operations of war, she would have been liable for sums paid by American insurance companies for German soldiers killed by enemy bullets, because these sums would have represented a "loss." For here too the above decisive criterion applied: the American pecuniary loss through an act for which Germany was liable.

In this case the decision of the Umpire rejected the American arguments, not because the correctness of the American arguments was denied, but because the claim seemed unfounded according to the special text of the provisions of the Treaty of Versailles.

The same theory reappeared in the claims of American maritime underwriters, in so far as compensation had been paid for destroyed or damaged goods or vessels of aliens. For the details we refer to Chapter VII.

Here too there was seen in the mere fact of the payment effected by the American companies a "loss" for which Germany was held liable. If this loss had been pressed only from the right of the owner of the goods, the insurer would have been a rightful claimant only if, on the principle of the transfer of the rights of the insured to the insurer with the payment of the insurance (a principle recognized as such in the civil law of all nations) he were able to press the rights of the owner of the goods. All claims from insurance cases affecting the goods of non-American nationals would thereby have been eliminated.

The justification of such claims was possible only from the point of view that the act destroying or damaging the vessel or the goods represented also a prejudice to the American insurance company. The loss suffered by the company through the act was treated as an "original loss" suffered by the nation, and hence national. The loss as such became the criterion.

And the same theory was to justify the claim of the American reinsurer, even if in the complicated nature of insurance business he was affected only as a remote reinsurer through the medium of other insurance or reinsurance companies which were intermediaries and non-American.

And under this construction, such a loss was of course also then originally American if, e.g., the sunken vessel belonged to a neutral and had

been rightfully sunk but was insured or partially or wholly reinsured by an American company.

Here too not only the American agent but also the American Commissioner deduced these consequences. And the outcome of the whole dispute was so very doubtful that Germany preferred a settlement by compromise, as has been stated.

The arguments of the American Commissioner in the basic treatment of the nationality of the claim moved in the same direction.

Under the point of view that only the claim of an American national is entitled to protection, those claims are eliminated wherein the rightful claimant has alien heirs, in accordance with Decision V prior to November 11, 1921. But in such a case too the claim of a deceased claimant should remain entitled to protection since under its non-satisfaction American interests would suffer. If the inheritance were not solvent, the fundamental principle that the rightful claimants—in this case the heirs—must be nationals of the claimant nation, should be subordinated to the protective needs of the American creditor of the decedent. Hence Germany would be held to pay to the extent of the amount necessary for covering his claim. Thus the interest of a third party, namely, the American creditor, who would otherwise suffer a loss, should take the place of the person into whose possession the claim passed by inheritance, and to a certain extent should form the criterion for the amount to which a claim, no longer national because of the inheritance, was to remain entitled to protection. That is, the ultimately material loss of an American national was the ultimate criterion.[15]

On this basis, with the approval of the American members of the Commission, one claim was long set aside in which the American branch of an alien corporation, which in accordance with a basic decision of the Commission was not a rightful claimant at all, but which had got into financial difficulties, had lodged claims whose satisfaction might possibly benefit American creditors. In this case a "national" claim, entitled to protection, such as had arisen in the previously mentioned case of the death of an American national, of whom aliens

[15] See Opinion of the American Commissioner in Decision V, p. 153 and p. 158 *sub* 3, par. 2. Cf. also Decision, vol. 2, p. 755, in re United States of America on behalf of B. W. Lougheed, Inc., Docket No. 6967. Here three individuals sue as "statutory trustees for the stockholders and creditors" of the corporation. They are at the same time "the sole stockholders." The claim denied on material grounds negates the American nationality of one of the claimants and his interest. But it is interesting to note that it is expressly stated: "There were no creditors."

later became heirs, had never come into question. Nevertheless through the medium of the American creditor behind it, this claim was eventually to be protected to the amount necessary for averting his loss.

The American point of view came out to its full extent in deciding a third similar dispute, namely, the claim of American survivors for loss of future contributions of persons who for their part had been killed by an act of Germany but did not have American nationality.

In this case, concerning the consequences of an act committed against a person, the German defense could not use those points of view which followed in the case of acts against property from the contractual limitation of the liability—as it was maintained by the Germans—to material values.

Here too it was the loss of the American survivor of the decedent for which compensation was demanded. And here the Umpire concurred in the American view.

Starting from the provision of clause 2 of Annex 1 to Article 244, he considered Germany liable for damages suffered by the nationals of the Allied and Associated Powers resulting from the "death of civilians caused by acts of war." The reasoning based upon this view uses general principles and agrees in theory with the construction applied by America to the life insurance and subrogation claims. "The claim of such survivor is original and not derivative." Hence it is not the act directed against the life of the decedent—which from the point of view of the nationality of the claim would not justify the American protective claim, since in the contested cases the decedent was not an American, and hence the American nation could not be injured in his person—but the act against the American survivors, i.e., against their "rights" toward the decedent which were frustrated by his death, this act forming the basis for the national suability of the claim. If the claim of the survivors were only a consequence of the killing of the alien, it would be "impressed with foreign nationality" and not actionable. Only the independence and originality of the right to protection enjoyed by the American survivors of the alien gives rise to the act against the American nation from which follows the international case. Thus the "act of Germany" which according to international conceptions and according to the provisions in the treaties as described in Decision I conditions German liability, is in a certain sense deprived of the requirement that it be directed at the effect of the injury, i.e., in this case at the person of a non-American,

and treated as a cause for injury merely because it occasioned an American loss. Where an American "has suffered damages by reason of the loss on the *Lusitania* of the life of a British subject," the legal inference is that such a person "has unquestionably been damaged by the act of Germany in the prosecution of the war, and such damage is clearly attributable to Germany's act as proximate cause."

These principles are developed in the decision relative to the death of a British national who had American dependents.[16] But they must apply also when a neutral has been killed, and according to the provisions of the treaties of Berlin and Versailles they must apply, too, when such a death took place under circumstances which involved no international liability with respect to the neutral country, since the factor of offense, of violation of international law, is not relevant so far as the originally damaged American is concerned. But with this the far-reaching significance of the principles becomes all the clearer, since in such a case the act causing the damage in itself does not belong to the acts for which Germany is liable with regard to the United States, and is brought into this category only because, by the fact that the "original" right of an American survivor is damaged, the act is directed also against American nationals.

The German side called attention to the fact that the same conditions would prevail if a non-American national with minor children dependent upon him (the children, being Americans) [17] were not killed but incapacitated. The rights of the dependents for support, etc., existing at the time of the act, are the same as those which survivors would have with respect to a decedent. If the dependents were "originally" prejudiced by the act, then even in the case of a mere injury an independent protective right would be bound to result.

This "theory of loss" is limited only by the principles of the doctrine of causal connection, as they are treated in Decision II, page 13, in the two decisions on war risk insurance premiums, pages 33 and 71, and in the decision on the life insurance claims, pages 133 *et seq.*

"The simple test to be applied in all cases is: has an American

[16] See Decision, pp. 195 *et seq.* In his survey of the decisions of the Commission (*American Journal of International Law*, January 1926, pp. 70 *et seq.*), Borchard, relying upon the reasons adduced by the Germans, called attention to the danger lying in this decision of the Umpire.

[17] This is not a far-fetched case, since every child born in the United States has American citizenship, and since on the other hand there are many immigrant families living in the United States (especially laborers) who never acquired American citizenship.

national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss[18] attributable to Germany's act as a proximate cause?"

That is, the fact of the financial loss suffered by the American national motivates Germany's liability if and in so far as it can be traced to Germany's act as the "proximate cause."

But the decisive factors for such a causal connection are not derived from special contractual provisions, but from the general legal principles of the doctrine of "proximate cause," "which clearly the parties to the treaty had no intention of abrogating" (Decision II, pp. 12–13).

Its development first came into question in connection with the claims for compensation for war risk insurance premiums.

In the light of the theory of "loss," and under the influence of the treatment of such claims in connection with the Alabama case, these claims were motivated so far-reachingly by the American agent that the American counsel, when asked by the Umpire in the course of the proceedings where the limit for the effect of German acts was to be found, replied that this limit was left entirely to the decision of the Commission.

In Decision II, page 13, this point of view was expressly rejected.

But the principle of causality is interpreted broadly. "It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act."

Even the indirect loss is included—perhaps under the influence of the broad text of the Treaty of Berlin, "provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed."

In this formulation of the doctrine of causality, the claims for war risk insurance premiums had to be denied in view of the nature of the "test

[18] How vague and in need of exact definition the term "proximate cause" still is, is shown by the fact that the British Government did not include claims for loss of profit in its reparations bill because they represent only "indirect and consequential damages," that is because the causal connection making compensation obligatory is denied. Germany's contractual restriction, following from the Treaty of Versailles, to compensation for "material damage" is not even mentioned.

On the other hand it is clear that in numerous international decisions, which have been approved by German writers too, the claim for compensation for loss of profit which is familiar in the civil law of all civilized nations, is admitted from the point of view of causal connection.

cases" submitted to the Commission, since the war as such could not be looked upon as an "act committed by Germany" and since for the rest, the individual German war measures as compared with the totality of risks confronting neutral shipping in such a war were too remote to serve as the cause for the loss "in legal contemplation" arising from the payment of the war risk premiums.

But the American agent believed that he could remedy this factually defective motivation by selecting a case wherein the connection between a German war measure and the payment of the war risk premium was clearer. Hence he reintroduced before the Commission the question of the reimbursement of the premiums, under circumstances in which the plaintiff, the Eastern Steamship Lines, Inc., a company domiciled in Maine and plying the New England waters, insured its vessels against war risks under the impression and in direct consequence of the sinking of the *Perth Amboy*, a tug belonging to the Lehigh Valley Railroad, by a German submarine on the morning of July 21, 1918, off the coast of Massachusetts.

Here the relation between the German act, the cause of the damage,[19] and its effect, the payment of the war risk premiums, was clearer.

But in this case too the claim was rejected, the causal connection being denied—Decisions, pages 71 *et seq.*

The decision is based on the fact that the action of the submarine caused the loss of the sunken tug only proximately. If in addition to the fact that the population was disturbed by the sinking, and if in consequence of such uneasiness, the plaintiff company decided to insure its fleet against war risk, it was the company's own volition which occasioned these expenditures, namely, the payment of the premium.

The cause of the insurance was not the menace caused by the actual German acts, but the fear of similar acts on Germany's part, not committed but merely threatening.

Hence an act committed by Germany is denied to be the proximate cause of the loss.

While in this case, accordingly, it is the lack of the causal connection, of the "link by link," which is interrupted by the intervention of the plaintiff's own volition in taking out the war risk insurance, which explains the denial of the claim; in the life insurance claims it is not the interruption but rather the limitation of the causality, as it followed

[19] The question how in this case and in the others there is "damage" involved, although the sums demanded had possibly devolved upon third parties, is not relevant here.

from the interpretation of the special provisions of the Treaty of Berlin, which among other things led to the denial of the claims.

The rigid observance of the principle that Germany is liable if an American national has suffered a demonstrable pecuniary loss, in case it can be traced to an act of Germany as a "proximate cause," [20] would quite generally lead to an obligation for compensation, also with respect to contractual rights which were prejudiced by an act of Germany.

The above discussed right to compensation of American survivors of alien decedents lies decidedly in this direction.

Nevertheless, this consequence was rejected in the suit of the life insurance companies, and for compensation claims derived from a purely contractual nexus, a further prerequisite was posited, namely, the "intent of disturbing or destroying such contractual relations." [21]

And beside this prerequisite, the foreseeability of the damage is further postulated with the well-founded reference to the fact that "the ever-increasing complexity of human relations resulting from the tangled network of intercontractual rights and obligations are such that no one could possibly foresee all the far-reaching consequences, springing solely from contractual relations, of the negligent or wilful taking of a life."

The motivation of the decision is here based upon the contractual relations in the case of the death of a person. The same principles occurring also in German law, must be applied appropriately to material damages and their consequences, so that the broadly conceived principle of the full logical effect of a cause for damage was not applied as far-reachingly as its formulation might have admitted.[22]

A further restriction of the causal connection is recognized when the plaintiff himself was at fault.

The question was touched in the case of Eisenbach Brothers & Company *v.* Germany (Docket No. 5257, pp. 267–72).

[20] As was cited above: "has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?"

[21] Life Insurance Decision, p. 137.

[22] Hence the claims for compensation for additional costs which an American incurred because in consequence of the death of a relative the burden of supporting a joint relative fell upon the survivor alone, were also rejected; likewise the claims for compensation for damages which arose from the loss of the decedent who was a partner or served as an employee of the plaintiff. Cf., e.g., Docket No. 2263, Myers *v.* Germany.

In this case, compensation was demanded for the sinking of a lot of raw hides aboard the steamer *Kerwood* when, on December 1, 1919, she struck a mine in the North Sea and sank. Germany contested her liability by the fact that through the provisions of the armistice of November 11, 1918, she was prevented from engaging in any further activity in the North Sea and consequently could not be held responsible for the condition of the mine fields after that date. "A man who is forcibly prevented from closing a knife opened by him cannot be liable for a damage caused through such knife to him who prevented the closing" (p. 269).

The decision rejects this plea and establishes the German liability. The uncertainty whether it was a mine of Germany or of the Allies is considered irrelevant since according to clause 9, Annex 1 *sub* Article 244, Germany is responsible also for war measures of her enemies and since it could be a question only of an "allied" or a German mine.

But the circumstance that the mine had been planted long before and that meanwhile Germany's activity at sea had been modified was declared irrelevant, and the causal connection was regarded as uninterrupted.

"The act of a belligerent in planting it, while remote in time from the damage which it caused, is not remote in natural and normal sequence. On the contrary, the mine effectively performed the very function it was intended to perform—the destruction of shipping."

But the decision contains the significant restriction: "It may be that cases will be presented in which such causal connection has been broken through negligence on the part of the one suffering the damage or his agents, or by some other intervening cause, which in turn constitutes the proximate cause of the damage" (p. 271–2).[23]

An interesting further development of the theory of loss is found in Decision VII of the Umpire, pages 308 *et seq.*

The starting point of the dispute there to be decided was in the first place the interpretation of the term "property" in the sense of the treaties of Berlin and Versailles, and that of the term "belonging to" as used in clause 9 of Annex 1 to Article 244 to establish the national

[23] It is noteworthy that here the Umpire obviously applies the American civil law conception to international cases. American law does not recognize the apportionment of damage between both parties in the case of concurrent offenses, but uses the principle that a concurrent offense of the other party removes the liability.

Decisions of international courts have often rendered awards which are at variance with the European principle of the apportionment of damages.

relation to the property, "damage in respect of all property . . . belonging to any of the Allied or Associated States or their nationals"; and in the second place, the question whether and to what extent Germany under the treaty provisions was responsible for loss of profit in the case of reparations and neutrality claims.

As a test case for deciding these questions, the agents selected a case in which a Norwegian vessel, the *Vinland*, which was chartered to an American, was sunk and in which the charterer demanded compensation for loss of profit.

The German contention conformed to that made in the life insurance and marine underwriter claims arising from war and neutrality damages, viz., that the conception of property in the sense of the treaties corresponded to the German conception of "*Eigentum*" and referred only to real, tangible things—in contradistinction to the term "property, rights and interests," used in the case of liability for extraordinary war measures; and that hence only real damage to things, to the exclusion of compensation for loss of profit, is liable to compensation.

The Americans interpreted "property" in the broadest sense and considered every American interest as protected and entitled to compensation—pursuant to the principles developed in conjunction with the claims arising from the death of non-American dependents and in conjunction with the claims lodged by the life insurance and marine underwriter companies.

This disagreement involved the theory of nationality, since the *Vinland* was a non-American vessel; and the American side considered Germany liable for the damage caused by the sinking of the *Vinland* even in case Germany's liability were limited to material damage, because the vessel "belonged" to the charterer.

The American argumentation adhered to the definition of "belonging to" given by the Commission through the Umpire in the decision concerning the term "naval or military works or materials," pages 94–5, in connection with the decision on the German liability for sunken Dutch vessels requisitioned by the American Government.

Thereby the control of and the material interest in the object was declared essential. "It is sufficient that the United States or its nationals had such control over and interest, general or special, in such property as that injury or damage to it directly resulted in loss to them." The decision also emphasized the fact that the risk was borne by the controlling party.

The American side tried to meet this definition by showing that the charter in question signified more than a purely obligatory relation, and that it was a "demise," a conception approximated by the German "*Ausrüster-Verhältnis*."

With the questions arising from these differences of opinion, the discussions of the two agents and the vote of the German Commissioner dealt, when meanwhile it had appeared in the course of the labors of the Commission that it would be expedient to formulate a general statement of the differences of opinion existing between the agents, and meanwhile, having been brought to the cognizance of the Commission.

In agreement with the German Commissioner, the later formulated vote of the American Commissioner was given a broader formulation which decided as far as possible all questions which had meanwhile arisen in this connection. And after the original vote had been supplemented by the German side (supplement of May 12, 1925), the whole group of questions as such was submitted to the Umpire for decision.

Hence the treatment of the *Vinland* case assumes an unimportant rôle in the decision of the Umpire. But he was afforded an opportunity thereby to give his decision a broader and more far-reaching basis in a large, interesting way.

In the two questions pertaining to the restriction of German liability to real material damage (p. 317) to the exclusion of compensation for loss of profit and with rejection of the interpretation of the *Vinland* charter as a "demise" (p. 333), the Umpire agreed with the German point of view.

The reasons given by the Umpire in the first question are exhaustive and politically interesting. But they do not concern the present question, so that it suffices to refer to the decision of the Umpire (pp. 308, 329).

On the other hand, the reasons given for rejecting the construction of the charter as a demise have no general interest, since the Umpire declares that this question is not decisive. He stated: "Nor is the question as to whether a particular charter is or is not technically a demise, as that term is used by muncipal tribunals, controlling in determining the right of the charterer of a ship which has been destroyed to an award under the Treaty of Berlin" (p. 334).

With the abandonment or certainly the extension of the earlier definition of "belonging to," a "*jus in re*" is posited which is derived

from the right to the use of the vessel but has a marked economic character.

"Where, under the terms of a then existing charter-party, the charterer was at the time of the loss entitled to the use of the ship on terms which would have had the effect of reducing the price which the owner could have obtained for it if sold burdened with the charter, then at the time of the loss the charterer had a pecuniary interest in that particular ship, a *jus in re*, a property interest or property right the subject matter of which was the ship, an interest entering into and inhering in the ship itself" (p. 336).

And this interest in the ship, this *jus in re* is then summed up (p. 340) under the conception of "property . . . belonging to" as used in Clause 9 of Annex 1 to Article 244, Treaty of Versailles. "The charterer's interest in this vessel under this contract was 'property . . . belonging to' the charterer within the meaning of that term as found in the Treaty."

This property thus defined, the nature of which is also apparent from the term "time-charter owner" frequently used in British and American law, is recognized in a practical way as "estate carved out of the ship and handed over for a specified term to the charterer" (p. 341). But this estate, it must be emphasized, is not identical with the amount of profit lost by the charterer to which it is not related theoretically.

In the case of the sinking of the vessel, the owner is entitled to compensation for the market value of the vessel. But if the vessel—at a time of high freights—is burdened with a long time-charter dating from a period of lower freights, the owner, to whom the high freight rates which the vessel can earn in the open market at the time of sale do not accrue on account of the charter, would receive more by the award of a compensation computed on the full market value than the ship was worth to him at the time of the loss. For the market value is determined in great part by the current freight rates. Consequently this surplus represents in truth the interest, the property of the charterer.

If for instance the monthly charter rate were $1000, while at the time of the sinking of the vessel (which would be decisive for determining its market value) the current rate was $1500, only the monthly difference of $500 and not the market profit deducible from a possible later increase in freight rates would be decisive for determining the estate of the charterer as his share.

These findings and the reasoning leading up to them have been warmly received among leading American jurists as being in harmony with the general American view and construction. And on the other hand, despite its dependence upon the special provisions of the treaties of peace, the decision rests so strongly upon general legal concepts that we may expect to meet it again in the future administration of international law, certainly in so far as the United States is concerned.

Hence it is well to pause a moment over its motivation and application.

As we have shown, it is based upon the interpretation of the right of the time-charter owner as a *jus in re* covered by the conception of "property . . . belonging to" of the Treaty of Versailles.

As was stated above, the conception of "belonging to" had already come under the cognizance of the Commission in the decision on the meaning of "naval and military works or materials," pages 94–5. At that time the control—the possession and the material interest in the object, following from the assumption of the risk—was declared essential.

In the present decision the assumption of the risk is ignored and the characteristic of property (which is assumed in the case of the time-charterer who uses the chartered ship) is extended: Actual possession is replaced by the right to possession, i.e., to future possession. Accordingly in the decision United States on behalf of Gulf Export Company *v.* Germany, Docket, No. 6629; Decisions, Vol. II, pages 725 *et seq.*, the claim of a time-charterer is examined who had chartered two Norwegian ships which had been sunk prior to their transfer to the charterer, "before the time arrived when they could be delivered for loading in the usual course of shipping practice the charters were terminated through the destruction of the ships." The claim, the purely obligatory basis of which can not be doubted, was denied on the purely material ground that the relation of the charter-rate to the current rate gave the plaintiff no estate in the ship. But the decision raises no scruples against his inclusion among those entitled to compensation. (Cf. also United States of America on behalf of West India Steamship Company *v.* Germany, Docket No. 6970; Decisions, Vol. II, pp. 753–54.) In the case United States of America on behalf of Gans Steamship Line *v.* Germany, Docket No. 6625; Decisions, Vol. II, pages 737 *et seq.*, the claimant was also awarded compensation in an instance identical in this respect. Here the British steamer *Themis* had been chartered for a longer period, for the summer months to the

Nova Scotia Company, and for the winter months to the claimant. The ship was sunk while operating in charter for the Nova Scotia Company. Nevertheless a *jus in re* was conceded to the Gans Steamship Line and compensation awarded.

Similarly an American sub-charterer who had taken a Japanese ship in sub-charter from a British time-charterer, was awarded compensation. (United States of America on behalf of Barber and Co., Inc. *v.* Germany, Docket No. 6969, p. 750.) "This subcharter in effect sublet the ship to the claimant for a limited period at an increased hire and assigned to claimant a proportionate interest in the chartered owner's interest in the vessel, which, on such assignment, became impressed with American nationality."

The decisions do not clearly show to what extent the travel-charterer would also, over and above this, have a *jus in re* which would be entitled to protection. In so far as the decisions deal with such claims they were decided against the claimants. But none of the decisions show that the basic principle that such claims could never establish a *jus in re* was one of the decisive factors. (Cf. the case of Barber & Co., Inc. *v.* Germany, Vol. II, p. 750, already cited in another connection, and the case of M. A. Quina Export Co. *v.* Germany, Vol. II, pp. 757–8.)

But the extensive development of the idea of "belonging to" was possible only by the simultaneous extension of the idea of "property."

It is significant that in his decision (cf. e.g., the above quoted sentences) the Umpire used not only the term "property" in his motivation, but also the terms "property rights" and "property interests." Thereby he adduces concepts which in the Treaty of Versailles were quite consciously not to be applied to reparation claims, which according to the decision of the Umpire are on a par with neutrality claims. For the reparation claims, the obligation of compensation is restricted to the damage suffered by enemy "property . . . belonging to," while for the damage caused by the application of extraordinary war measures, the liability extends further to all damage suffered by enemy property, rights and interests, Article 242 making it clear that this involves liability on the part of Germany which is purposely of a different nature.

The application of "property rights" and "property interests" to a claim belonging to the reparations class seems all the more objectionable since the legal nature of the claim of the time-charterer is in itself by no means free from doubt.

The motivation with which the Umpire (p. 334) rejected the distinction between an ordinary time-charter and the demise connected with far-reaching rights, admits the conclusion *prima facie* that he would derive the definition of a claim entitled to compensation from the special provisions of the Treaty of Berlin. "Nor is the question as to whether a particular charter is or not technically a demise, as that term is used by municipal tribunals, controlling in determining the right of the charterer of a ship which has been destroyed to an award under the Treaty of Berlin."

But it can not be assumed that this was actually the conviction of the Umpire (which would not have been motivated) since in the same decision he clearly expressed the opposite view. On page 336 he discusses the right of the charters, which he designates as *jus in re* (see above quotation). He then continues, saying that such a right and interest is an encumbrance of the ship in the sense that it represents a limitation of the right of the owner in the possession, control, and use of the vessel and consequently influences the price at which he might sell it with this encumbrance on the open market. "It is an interest in the subject matter which the municipal courts will protect against both the owner and those claiming under him with notice thereof." Apparently, the decision is here based upon civil law conceptions which alone can be the basis of the protection of civil law administration. A different interpretation would be difficult to understand for the treaties of Berlin and Versailles nowhere define "property, rights, interests, belonging to," nor have they expressly formulated these terms in a deviating manner. Hence the civil law relations for which the protective provisions of the treaty are intended, can acquire their content and delimitation only from civil law.

Accordingly, any future development and utilization of the thoughts of the Umpire will have to take into account the legal nature of the rights of a time-charterer.

But to what extent the conception of a right accruing from a time-charter as a *jus in re* and a property right, with its far-reaching international effect, agrees with the present status of Anglo-American law, is a question which at first sight is still open.

Thus in the Tamplin case (1916, 2 A. C. 397), decided by the House of Lords, we find the sentence: "the charter is a contract by which the ship-owner during a certain period agrees to do certain work for the Charterer, but is not a contract under which the charterer has any interest in the ship except that it is the vehicle with which the ship-

owner is to do the agreement work." And in the Norburn case—The Federated Coal & Shipping Company *v.* The Crown, 10 Lloyd's List Law Reports 620 (1922), Justice Bailhache said (p. 621): "The suppliants—the charterers—had no property in the *Norburn*. They were not in possession of her. Their charter-party was not by demise." And in Dominion Coal Company *v.* Maskinonge Steamship Company, Ltd., 1922, 2 K. B. 132 to 138: "A charterer, if there be no demise, has no property in the ship, nor has he even possession: Scrutton L. I. in Elliot Steam Tug Co. *v.* Shipping Controller."

Also in the American decision of the Circuit Court of Appeals, Second Circuit, June 7, 1926, No. 272, in re Flint *et al. v.* Robins Dry Dock and Repair Company, the court, in opposition to the view of the first court, held that "no property interest, not even possession, had been created in the vessel as an agent of the time charterer." The decision, not yet legally binding at the time of writing, lies in the direction of the Umpire's decision, granting the time-charterer, of a ship (*Bjoernford*), the repair of which in dry-dock was delayed by negligence on the part of the contractor for the repair, a compensation claim against the contractor.

There are good reasons why these theoretical scruples are subordinated in the Umpire's carefully considered decision. It is characteristic of the American point of view, which makes its approach from the opposite angle: It is the American theory of loss which is here again maintained and which is deduced and delimited in clever and suggestive form by the limitation of German liability to material damage, as provided by the treaties of peace. According to the Treaty of Berlin and its interpretation by the Commission, Germany is liable in the case of claims like the present one, only for the market value, i.e., for the objective value of the destroyed object as such, i.e., according to the interpretation given by the Commission: the object disjoined from its relations to third parties.

But if within this value thus to be determined, a portion economically accrues to a third party, and if therefore the loss of the object itself signifies a loss for him on the basis of this relation, this third party is entitled to compensation for his share within the limits of this material value, without increasing Germany's liability, which is limited to the material damage.

If the two claimants, in this case the owner and the charterer, are both Americans, the Commission has fulfilled its task by determining the market value of the vessel which calls for reparation. A settlement

among the interested American parties themselves is a matter for the regular American courts in case of dispute. If only one of them is an American, then only his claim is subject to the jurisdiction of the Commission.

If X were the value of a non-American vessel as such, i.e., the free vessel, and if Z were the estate whereby the market value would decrease if the charter (unfavorable for the owner and low in comparison with the actual freight market) were taken into account in the sale, then in case the charterer is an American, he will receive the amount Z of the market value of the ship computed independently of the existence of the charter. And if, on the other hand, the ship were of American nationality, but the charterer an alien, the American owner receives X—Z.

Just as this principle may lead to a partial liability of Germany in case of a non-American vessel which was sunk, so it may lead to a diminution of German liability in the case of an American vessel.

But in so far as the ship or the object does not belong to an American owner, the broader interpretation of "property belonging to" always leads to an interruption of the principle of nationality and to a broadening of German liability which is contractually limited to material damage.

The *Vinland* was a neutral ship. It was rightfully sunk, even according to the decision of the Umpire, page 339. But if American usufructuary right existing in it is an estimable factor of value within the value of the ship, the American usufructuary is entitled to compensation to this extent.

The fact that at the same time the vessel undoubtedly belongs to a neutral owner, who has no claims whatsoever, does not oppose this.

It is interesting to mention that the encumbrance of the value of a ship derived from a charter need not be identical with the ownership interest of the charterer. So there were among the cases presented to the Commission a few in which tank vessels were chartered at very unfavorable rates for the owner but with the clause that the vessel could not be used for the transport of contraband, nor for voyages in the waters of the war zone. In these cases the diminution in value of the vessel itself, i.e., the encumbrance through the charter, was considerable on account of the low charter rate. But subjectively the interest of the charterer, who because of the clauses was quite restricted in his use of the vessel, was unproportionately much slighter.

Other difficulties result when various ownership interests of this

kind collide. It must be remembered that in view of the same legal conception the insurer too has a limited ownership interest in the insured object which becomes unlimited through the payment of the damage. Now if a neutral vessel chartered to an American is fully insured by an American insurance company, the rights of the charterer and of the insurer must collide since Germany is not liable beyond the value of the ship.

For the rest, this case indicates that both the usual practice and the civil law of seafaring nations do not recognize the alien ownership interest of the charterer in a vessel. For though the owner may insure only his interest (apart from exceptions which do not interest us here), the full insurance of the vessel on his own account is not denied him despite existing encumbrance of his vessel.

Beside these more constructive difficulties, the difficulty, quite extraordinary under war conditions, of computing the various estates and their relations is of importance. In order to remove or at least diminish these difficulties, the Umpire, in extremely careful and well-planned form, compiled the principles in Decision VII A which guide the determination of the market value of vessels on the one hand, and of the estate of the charterer on the other. For the points which are here relevant, we refer to this interesting decision.

The question of the criterion for appraising destroyed material values in general and ships in particular occupied the Commission as early as the spring of 1924 (cf. also Decision III).

The depreciation of the value of ships had brought it about that in 1924 a ship of the same value could be purchased at a much lower price than at the time of sinking. Hence the question arose whether Germany was to make amends for the former higher price which in some cases could now purchase two or more vessels of the same type, or for the present price.

The decision rendered to settle this difference of opinion is given among the decisions, pages 330–1, note 19. It deals first of all with the time which is to be decisive for computing the damage. But it establishes also that the "market value" and in the absence thereof the "intrinsic value" is to be restored. This decision is then further developed in Decision VII, page 331, in that the Umpire, in connection with the question of compensation for loss of profit, shows that in estimating the reasonable market value, the individual circumstances of the case, e.g., in case of a factory the capacity maintained by it, its earning capacity and even the good-will of the firm, i.e., circumstances

independent of the objective value of an object, must be taken into account.

These views, then merely suggested, were very carefully developed in Decision VII A for the question of appraising ships, and in connection therewith the perhaps still more difficult question of appraising the estate of the charterer was considered just as carefully. For this second part of the decision, it is noteworthy that it abandons the former view that the estate of the charterer has a market value "if the hire stipulated to be paid thereunder was less than the current marked price, this charter had a market value" (p. 340)—"for charters have never to any considerable extent been sold and purchased for a present out-of-pocket cash consideration" (p. 709).

In application of the principles of this decision, the Umpire himself then decides a number of cases, weighing and utilizing the complicated facts in exemplary fashion. These cases are reprinted in the English edition.

The decisions deal not only with the appraisal of the estates of time-charterers, but include also other data in which the principles laid down in Decisions VII and VIIA lead to legally interesting results.

Thus in the case United States of America on behalf of Standard Oil Company of New York *et al.*, Docket Nos. 5323, 5434, 5469, Vol. II, page 660. Here it is a question of making reparation for the value of tank steamers owned by British companies, the stockholders of which were the claimants, the steamers having been requisitioned by the British Government. The British Government had restored the value of these vessels since they were requisitioned. But the claimant stockholders demanded from Germany the additional value, about seven millions of dollars, which the vessels would have had as "free ships." The claim was denied since the sinking affected only ships which because of requisition had only a lower market value (the requisition signified an encumbrance of their value), and since Germany could not be held responsible for the depreciation caused by the requisition.

Another case concerned the claim of the Housatonic Steamship Company, Inc., Docket No. 44, Vol. II, pages 689 *et seq.*, an American company which had purchased the German steamer *Georgia* which had sought refuge in an American port at the outbreak of the war. In February 1916, the company chartered the vessel to a British firm for the duration of the war, with the provision that the chartering firm was to secure from the allied governments a guarantee against confiscation of the ship. The charter amounted to about seven

shillings as against thirty-two shillings, the then current rate. In February 1917, the vessel was sunk. The claim was denied because under the circumstances the ship had only a slight value for the owner, covered by the insurance sum received.

Unfortunately no decision was reached regarding the question what the compensation for this estate of the charterer would be in case a ship were not destroyed but merely damaged. Decision VII A itself in its recapitulative conclusion, looked toward such a compensatory right in favor of such an estate even in the case of merely damaged vessels. For it expressly prescribes the development of all points discussed in the decision for claims wherein an American interest not comprising the full value of a destroyed or damaged ship is pressed.

But on the other hand, in the case United States of America on behalf of American-Hawaiian Steamship Company, Docket No. 6454, pages 844 *et seq.*, the Umpire agreed with the German view whereby in the case of damaged ships Germany, according to the provisions of the treaty, is essentially responsible only to the owner for costs of repairs.

An attempt to evade the limitation of German liability to the value of the object itself, relying upon the mortgage right to the cargo for the earned freight, failed. It was made with detailed motivation in the case of United States of America on behalf of Arthur Sewall and Company, *et al.*, Docket No. 6070, Vol. II, pages 674 *et seq.* According to the legal provisions applying to the case, no claim existed for the partial freight earned up to the sinking of the ship. Hence in accordance with the German view, the claim was denied by the Umpire because a right to the freight would have accrued only after the completion of the voyage.

It seemed expedient to mention these examples and to deal in detail with the basic question in order to show the significance of Decision VII of the Umpire. But in part we have digressed from our subject proper, the treatment of the theory of loss.

In taking this up again, we should mention first the extension of the idea of loss, which rejected the German point of view and saw the decisive criterion not in the actual prejudice to the party concerned but in the objective fact of the destruction of a material value belonging to an American national.

The question was decided in appraising the loss of the bunker coal when the ship was sunk. In many cases the owners had received the freightage, and hence the German agent took the view that in such a case the owner suffered no damage by the sinking of the coal intended

for the boilers because this coal, intended for use on the voyage, was covered by the freightage received.

The Decision VII, page 343, rejected this plea.

It was decisive that obligatory relations which possibly touch the purely pecuniary side of the loss should be disregarded, and that only the objective act of destruction of the material value belonging to an American national is necessary for assuming that a loss has occurred.

The same point of view had to be applied when goods were sunk which had been sold to an alien who bore the risk of the voyage, the ownership however still being in the hands of an American. This is an objective development of the loss theory whereby the loss is deprived of its capacity of damage caused thereby.

CHAPTER IX

NAVAL AND MILITARY WORKS OR MATERIALS

Clause 9 of Annex 1 *sub* Article 244 of the Treaty of Versailles, in providing that Germany is not responsible in the case of damage with respect to "naval and military works or materials," introduced a conception into the treaty which does not conform to the generally recognized terminology of international law.[1]

The question of its application confronted the Commission in the more restricted formulation, the problem being to decide which ships were "naval and military materials."

A decision was reached by submitting to the Commission a number of different test cases, all belonging to the American war period. The cases are mentioned and discussed in the "Opinion construing the phrase 'naval and military works or materials' as applied to hull losses and also dealing with requisitioned Dutch ships."

The American agent took the position that Germany's exemption from liability for "naval and military works or materials" was a concession on the part of the victorious powers "voluntarily concluded to forego making claim for losses of property, the economic use of which was solely or primarily for war purposes." Invoking the armistice, wherein Germany bound herself "to provide for repair of damage done," the exemption granted to Germany in clause 9 was interpreted as a "partial remission by the Powers of rights accorded them by Germany in the Armistice" and its extent in case of doubt was to be interpreted strictly against Germany.

Relying upon the interpretation of the Reparations Commission, whereby the exemption clause includes:

(*a*) independently of the question of ownership (governmental or private)—all vessels used "for offensive operations" and

(*b*) vessels owned by the naval authorities and used "in connection with operations of war, whether offensive or defensive,"

[1] A similar but more restricted term is found in the treaty between the United States and Algiers of September 5, 1795, wherein Art. II mentions "naval and military stores, such as gun-powder, lead, iron, plank, sulphur, timber for building, tar, pitch, resin, turpentine and any other goods denominated naval and military stores."

three classes of vessels were conceded by the American side as coming under the exemption clause:

(A) Ships owned by the United States, devoted to war purposes and "commanded and manned by officers and men in the naval service of the United States."

(B) Ships privately owned if transformed into vessels of war and in the direct control of the United States. Such ships are under naval command and are intended "clearly for war purposes of an offensive character." In the main, they conform to the provisions of the Hague Convention of 1907.

(C) Ships owned by the United States, built or acquired from means appropriated for the Navy or War Department and "engaged in an operation of war, either offensive or defensive."

This latter class would include troop transport and fleet supply ships under permanent military control, belonging to the government and acquired from means appropriated for the Navy or War Department; also other ships belonging to the government, under the control of the Shipping Board and assigned by it to the Navy or War Department, manned by a navy or army crew under military control and engaged "in operations of war, either offensive or defensive."

This American formulation, in agreement with the interpretation of the Reparations Commission, holds that privately owned ships come under the head of "military and naval materials" only if used for offensive purposes. But the definition is narrower than that of the Reparations Commission in so far as it also prescribes naval command for privately owned vessels, and a naval crew for vessels owned by the government, in so far as they are not "regularly commissioned vessels in the Navy and Army Service."[2] This expressly excludes those ships which were assigned to the War or Navy Department by the Shipping Board but were manned by a civilian crew.

The German side, pointing to the genesis of the clause, contested the alleged voluntary concession, with the deductions made from it, and in opposition to the American interpretation, which concerned itself mainly with the ownership question, it emphasized the criteria of "use" and "purpose" in connection with the "military effort" pursued thereby. Considering this position, the German view included in the exemption clause:

(A) Ships "incorporated in the United States Navy,"

(B) Ships controlled by the army or navy or some other military branch.

[2] Cf. pp. 43, 46, 53 of the American writ.

For these two classes the proof of non-military use was to be inadmissible.

(C) Ships controlled in some other form "by other United States authorities," except if used exclusively for peaceful commercial purposes. Here the presumption was to be refutable by evidence to the contrary.

(D) Merchant ships armed by the American Government.

(E) Ships convoyed by United States naval forces; and finally

(F) Ships having a relation to the governments of other Allied or Associated Powers corresponding to one of the relations under A–E.

In so far as this briefly summarized German position, in connection with the genesis of clause 9, reverts to the armistice and its antecedents, it is sufficient to refer here to what was said in relation to the neutrality claims, and to the remarks of the Umpire in Decision VII.

By way of supplement, we may repeat that the text of Article 232, paragraph 2, agrees verbally in its essential points with the reservation of the allies accepted by Germany and thus made a part of the peace agreement of November 5, 1918. According to this, Germany was to give compensation for all "damage done to the civilian population" of the allies and their property by the aggression of Germany "by land, by sea, and from the air." Paragraph 2 of Article 232 repeats this restriction of Germany's obligation to damage inflicted upon the civilian population, and then in clause 9 of Annex 1 *sub* Article 244 to which paragraph 2 of Article 232 refers in a broad way with the words: "and in general all damage as defined in Annex 1 hereto," the liability is extended to all property "wherever situated" and "belonging to any of the Allied or Associated States or their nationals." This extension doubtless exceeds the agreement of November 5, 1918, and hence can not be interpreted as a voluntary restrictive concession of the victorious powers, since as late as the summer of 1919, in the reply to the German remonstrances against the conditions of the Versailles draft, the allies had declared that the draft had been made "with scrupulous regard for the correspondence leading up to the Armistice of November 11th, 1918, the final memorandum of which dated November 5th, 1918."[3] Thereby Germany's right to observe the conditions concluded in November 1918, is again recognized as a matter of principle, so that the extension of German liability made in clause 9 is a deviation from the agreement which in case of doubt must be interpreted against the deviators.

[3] Temperley, *A History of the Peace Conference of Paris* (London, 1920), Vol. II, p. 311.

For the rest, the position maintained by the German agent—as well as the American view—was valuably motivated in detail in the two memoranda in connection with the individual categories formulated by both sides. We must refer thereto for a further study of the questions to be decided. In discussing the points of view upon which the decision of the Commission is based, we shall revert to these questions.

In the very detailed and comprehensive discussions and negotiations in the Commission, which preceded the decision, it was agreed that the term "naval and military works or materials" must in the main be defined from the treaty itself. For this purpose Articles 209 and 210 were used, but above all Article 202, which—in a more restricted context—provides in the case of surrender of military automobiles and naval aeronautical material, that for the surrender of certain specified categories all materials were to be included "which are or have been in use or were designed for warlike purposes"—a provision which was then extended in Article 210 for "military and naval aeronautical material" in such a way as to include material capable "of being used by aircraft."

Thus for purposes of objective delineation three categories were envisaged: "things in use, things designed for use and things capable of being used"; and for theoretical delimitation three questions: (1) What is use in this case? (2) Used by whom? (3) Used for what?

1. For the definition of "use" it is sufficient that it be actual, but this actuality is not alone decisive.

Railway tracks used for the movement of cannon to the line of battle are—by virtue of this actual use—military material.

But this use is not always decisive. The cannon in the reserve depot behind the front and the rails intended for the transportation thereof are not in actual use but at the direct disposal of those in charge of the conduct of the war—in a sense in "constructive" use,[4] while the cannon and the rails being transported aboard are only designed for its use.

But this distinction is materially irrelevant in that the designation for the use must suffice as a characteristic of "naval and military material." The distinction was expressed in the decision of the Umpire (p. 78) in two forms. In the first place, no compensation is due for "property . . . designed or used for military purposes." In the second place, mention is made of "property impressed with a military character either by reason of its inherent nature or by the use to which it was devoted at the time of the loss." The two expressions have the same meaning.

[4] This designation employed in the discussions is similarly used in the Opinions of the Commission, No. II, p. 99.

The term "devoted" used in the second formula led to the question to what extent, for example, food supplies intended for the army and awaiting shipment from the English coast to the continental theater of war were included. This question was answered in the affirmative by the Umpire, who said that they were doubtless intended for military use. The choice of the term "devoted" instead of "designed" was explained by the fact that food supplies, for instance, which were stored by farmers in the western United States could not yet be considered "military material" before their delivery to the army authorities and prior to their shipment, since, though "designed" for military purposes, were not yet "devoted" thereto.

On the other hand, the question may be important how long the character of "military material" acquired by actual use continues in the case of objects not capable of military use. Such a continuance must be assumed until the object is again restored to its peaceful purpose.

2. The object must be used—or be intended for use—for acts of competent organs of those responsible for the conduct of the war. The decision of the Umpire cites the example of the Paris taxicabs which become war material as soon as they are used to transport troops. Similarly the example of rails used in a private enterprise for producing or transporting war material, in contrast to rails used by the army to transport troops to the front, is based upon this reasoning. Another example used in the deliberations of the Commission is the gun belonging to a *franc tireur* and which, regardless of whether it is subjected to destruction, does not become military by virtue of being used by its owner so long as he is not an organ of those responsible for the conduct of the war.

3. Finally, the object must be used for military purposes. To define this concept more precisely, the term "military effort" was first used. But the American Commissioner objected to it as possibly leading too far. Also the in part purely civilian activity in the United States, as, e.g., the administration of the railroads by the government, or the control of production signified in the final analysis a military effort, but the material used can hardly be termed "military material." To avoid this, he suggested "military operations," since it is primarily a question of intention in connection with the events of war.

This proposal led to a discussion of the question whether the term "military" was not too narrow and did not involve too much of an actual offensive intention. To avoid that, the expression "warlike" was considered, since a basic restriction of the term to offensive acts was not in the intention of the Commission. A careful test, however, showed that the two terms are synonymous. Hence the term "military" was allowed to stand, but it was stated that for the expression thus chosen, the question of offensive or defensive intention was irrelevant.

In harmony with this conception, the further expression "in furtherance of a military operation" is used in the decision and the automobile of the President of the United States is cited as becoming military material when used by the President along the front.

Thus too, musical instruments or sporting goods used only behind the front would be military material, since with their purpose of maintaining and promoting the morale of the troops they serve the military operation.

In accordance with criteria thus determined, an attempt was made, with the help of thirteen typical cases submitted to the Commission by the American agent, to delimit the term "naval material" for ships, as is done in the decision.

In the decision, the criterion of ownership as a criterion of the idea of "naval material"—posited by the American agent—is rejected.

In so far as the decision positively determines the criteria for the idea of "naval material," the points are formulated under I–III and V, while under IV and VI other criteria established by the German agent are rejected.

Decisions I–III grew out of the general points of view described above.

(a) Since actual use is theoretically the minus contained in the realized intention of use, the decision emphasized this intention in twofold form. It speaks under I and II of the furtherance of a military operation, and also in I of the purpose directly in furtherance, etc.

How far-reaching this formulation was conceived by the Umpire is shown by the case of the oil tanker *Joseph Cudahy*, claim No. 547, used by the United States Department of War but returning empty to the United States and classified as war material.

The objection of the American Commissioner to this inclusion led to the discussion of the general question: how long the "naval material" character of a vessel not built or equipped for war persists.

Here the criterion of continuance of military character up to the time of restoration to its peaceful destination, used in the introductory remarks, was decisive. A ship used by the War Department is not naval material if and as long as it is on an intermediary trip; for instance, transporting tropical fruit, intended for the civilian population, from a Central American port to New York. But the return of a "naval material" ship in ballast to its port is radically different from such actual peaceful use. The American Commissioner, using as an analogy the treatment of a blockade-runner, wanted to regard the participation of the ship in the direct war operation, i.e., the transportation of war material to the army, as decisive, while the German side pointed to the difference which follows from the fact that in the case of blockade-runners there is a temporary relation between them and a very definite act, while in this case there is a permanent relation to the "military operations." It would be impossible to provision the troops and fleet in Europe if the eastbound vessel did not return. The arm which deals a blow is also in active operation while it prepares for the next blow.

(b) The use or purpose of use being thus treated as decisive, the criterion of government ownership—deviating from the view of the two agents, who in certain cases regarded such ownership definitive—was declared irrelevant. This applies also to the more restricted interpretation given by the German agent in the term "incorporated in the United States Navy."

The reason was found in the special character of the American Navy which is responsible also for the regulation of rivers and certain surveying projects. The materials for this work, e.g., dredges on the Mississippi, have no military character whatsoever. The American side desired their omission, but this proved only of theoretical significance. There was no objection to this since the criterion of government ownership in connection with every "purpose directly in furtherance of a military operation" was quite sufficient for including material serving in any way as war material.

With the rejection of the narrower interpretation of the American agent, the limitation of the term "naval material" to ships used for offensive purposes was denied by the definition given in I and II.

Only the general conception of "purpose directly in furtherance of a military operation" stands.

But—in keeping with the norms just mentioned—such a purpose is only relevant for the definition here in question when it is pursued by

the competent authorities, primarily the War and Navy Departments.

This thought is embodied in No. III of the Decisions: private use does not and can not make a ship "naval material."

In connection with the discussion of the view formulated under VI, the difference between the question whether a sinking was admissible in international law, and the question whether the sunken vessel was military or naval material must be treated in greater detail. It suffices here to emphasize that the distinctive criterion of use by official war organs leads to the elimination of use by private parties for private gain.

If then under IV, this connection with the official American war organs is denied in some cases, although the Shipping Board is an American organ connected with the conduct of the war, and although it is a question of ships requisitioned by it, yet this rests upon the special circumstances of fact under which these ships thus requisitioned remain reserved for private navigation and private trade as defined in detail by the decision.

For the rest, the decision of course does not absolutely exclude ships thus requisitioned from the category of naval material, but merely rejects the presumption for the military character of such ships as demanded by the German agent under C, so that it will depend upon the facts of the special case whether a ship thus requisitioned can be regarded as "naval material" or not.

(c) The variety of the cases submitted to the Commission made it imperative to define exactly the relation of the official war organ to the object used or to be used, i.e., in this case the ship. The decision under V serves this specific purpose.

In point of fact, it starts from the circumstances discussed in the decision itself. Pursuant thereto, the Shipping Board had the right on the one hand to assign the ships requisitioned by it to private persons —the owners or third parties—for further use (under the terms of the so-called time-charter), or on the other hand to transfer them, with a brief respite for the owner, to the War or Navy Department. With such transfer, the ship acquired the status of a public ship. Thereby the crew also passed into the service of the government, without, however, entering into an "official" relation to the government in the German sense. The "bare boat charter" usually coming into force for such cases of transfer merely provides in Section 2 that "the United States, at its sole expense, shall man, operate, victual and supply the

vessel."[5] The consequence was that the crews of ships thus requisitioned were usually civilian crews in whole or in part. The navigation of the ship in particular usually remained in the hands of a civilian master—as, e.g., in the case of the tanker *Cudahy*.

In category C, the American agent had tried to limit the quality of naval or military material for ships thus requisitioned to those ships which had an army or navy crew under military command.

This position was rejected in the decision under V, and the fact that the crew was hired and paid by the government was recognized as decisive in the sense that in the presence of the prerequisites mentioned in the decision the presumption of the military character of the ship was established.

The decision rested upon the consideration that it is not relevant whether the individual concrete act was performed by an official war organ, but that it was essential that the control over the actor must be fully in the hands of the war organ. The civilian master of the ship employed by the Navy or War Department may preserve his full freedom of decision in individual matters concerning the navigation of the ship. But in the totality of his acts, he always remains subject to the orders and control of the Department, and it depends only upon the latter, not upon the master, to what extent free decisions are to be left to him.

This reveals an essential difference for cases in which individual orders, either general or concrete, are officially given with the obligation of obedience, in the case of ships used in private service, the crews having been hired by the owners or charterers.

This applies, for instance, in the case of the numerous instructions on definite routes, also in the case of special instructions to ships en route, such as were undoubtedly given often during the war, especially in order to avoid submarines. Here the control affects only a single act and does not exclude the freedom of action either on the part of the master or on the part of the owner or charterer. Hence this control was not deemed sufficient to make a ship naval material (cf. Decision VI, *c* and *d*).

But possibly sufficient control could be seen in the mandate given the chartering War or Navy Department through a time-charter. Such a relation is considered essential by the Reparations Commission under certain circumstances, and in keeping with the character of the charter

[5] The spirit of this control explains that the Government of the United States, in Sec. 4 of the charter, assumed full sea and war risk.

it gives the time-charterer greater power than a simple voyage charter does.

The question was discussed in connection with the steamer *Motano*, No. 551, wherein a time-charter on the part of the British Government was claimed by the German agent. But it was not decided because proof could not be adduced.

With the limitation of the extent of the relevancy of a control of the vessel by official war organs, that part of the decisions was touched which deviates from the German position as maintained by the agent.

It had appeared that all, or at least the majority of ships operating for gain and therefore per se not coming under the category of naval material, were armed with one or more cannon and usually had on board, over and above the regular civilian crew, a more or less numerous military crew for operating the cannon.

Such ships were designated by the German agent as military material.

The Commission did not concur in this view. It asserted that even if such armed protection, intended merely for protection, were in violation of international law,[6] and would hence justify sinking in accordance with the rules of international law, this factor could not be decisive here because under Decision I Germany was responsible for every act, whether legal or not, and because for the answer to the question what was naval material, the legality of destruction or damage was not relevant.

The purpose of arming must be decisive, it was said, and only if this purpose were offensive would the purpose of "furtherance of military operations" have come into play. Had this been present, the qualification of the ships as regards naval material would have been modified.

But the detailed instructions given to the ships showed that the arming had no such purpose, and that the security of the ships—eventually to be sure by forcibly warding off submarine attacks—was considered the sole duty of those in charge of the ship.

Thus the purpose of furtherance of military operations and the military character of the ships, deduced solely from their being armed, were eliminated.

Similar points of view were decisive in the treatment of convoyed ships. Here too the question of the legality of the sinking was discarded. But for the rest, the Commission held that the character of a vessel per se undergoes no change if it is convoyed, and that the right of giving instructions and exercising a definite control, deduced from the

[6] This was contested by the American side.

convoy, is not to be defined in such a way that this circumstance alone gives a ship military character.

Hence the view that convoy in itself makes a ship naval material was denied.

The last question presented to the Commission in connection with the problem of naval material, concerned the obligation of compensation for neutral vessels requisitioned by the American Government. The important points for answering this question do not touch the definition "military and naval material" but are derived from the idea of property declared to be entitled to protection in accordance with clause 9 of Annex 1 *sub* Article 244 of the Treaty of Versailles. Hence they are better discussed in connection with the questions concerning this idea and its delimitation.[7]

The points of the decision in question were again taken up later in defining the term "civilian population," to which the German liability for the damage of persons is restricted according to Article 232, Section 2.

As a test case for the differences of opinion arising in this connection, the claim of Christian Damson, captain of the steamer *Cudahy*, was chosen. The decision is published on page 243.

The *Cudahy* had been declared naval material in the decision discussed in the first part of this chapter.

It was intended for the exclusive use of the Army Transport Service of the United States, was used for transporting gasoline and naphtha for the front, and was sunk on the return voyage in ballast.

The captain of the *Cudahy* was the claimant Damson, who sued for compensation for injuries suffered at the time of the sinking, and for loss of property.

According to the findings of the Umpire, Damson was entrusted by the quartermaster general with the command of the vessel, was to wear a uniform in service, and belonged to the class of persons "accompanying or serving with the armies of the United States in the field" (p. 260), yet he did not have a military status.

Hence the American Commissioner affirmed his civilian status, emphasizing the fact that the *Cudahy* was not the property of the United States but rather a privately requisitioned ship. He also showed that according to American legislation, Damson had no military character.

The Umpire did not follow this reasoning. He refused to interpret

[7] Cf. Chapter VIII.

the term "civilian population" as applying to that part of the population which, according to the special laws of the country concerned, can not be considered military. He took his definition exclusively from the treaties of Berlin and Versailles, and in his interpretation used essentially the same views as were used in interpreting "naval material."

Hence in determining the status of a person, it must be asked what purpose that person served at the time of the damage. If at the time he was "devoted" to the "furtherance of a military operation" (p. 263) he loses the legal protection accorded to the civilian population by the Treaty of Versailles.

It is the illustration of the Paris taxicab which is again used here. The driver of the cab transporting troops to the front loses his civilian status during the performance of this duty (p. 263).

This applies not only to the person, but also to the effects belonging to him in so far as they serve the personal use or purpose in the prosecution of which the person lost his civilian status.

Hence the loss of property suffered by Captain Damson does not entitle him to compensation.

Otherwise the library of an officer (fighting at the front) which was sunk en route from Cuba to New York. This case was decided by the Commission.

The Damson decision was supplemented later in another decision of the Umpire in re United States on behalf of Martin C. Young *v.* Germany, Docket No. 5805.

Young was a stoker aboard the *Lucia*. The ship was requisitioned by the Shipping Board and assigned to the War Department by time-charter. The crew, composed of civilians, was furnished and paid by the Shipping Board.

Hence the military control to which Damson was subject, did not exist in this case.

But the ship itself, according to the decision of the Umpire, was naval material because it took supplies to the fighting front for the War Department. This fact in itself was considered decisive. The crew of such a ship, serving the warlike effort of the United States, was not considered as a part of the civilian population. Hence the claim of the survivors of Young, who sank with the ship, was denied.

Different circumstances were presented to the Umpire for decision in the claim of a certain Arthur E. Hungerford (Vol. II, p. 766 of the English text). The claimant and with him a number of others were members of the Young Men's Christian Association, and were bound for

the French theater of war. It was their duty to maintain the morale of the troops—"a specific military function was assigned to the Y. M. C. A. Its duty was to assist in maintaining and promoting morale," page 769. For the sake of convenience, they were subjected to military control.

On April 28, 1918, the *Oronsa*, on which the claimant and his associates were transported to the theater of war, was sunk by a German mine in the Irish Channel. The personal property and equipment necessary for the performance of their duty, totaling $50,000 in value, were lost. The claim was denied because "they had voluntarily segregated themselves 'from the civilian population' as that term is used in the Treaty of Berlin."

On the other hand, the claim was granted of a man who had reported for military service, had been subjected to a preliminary examination and was then ordered to go to Paris Island, South Carolina, for a final examination. En route he came to grief as the result of a German submarine attack (Rosenfield, Docket No. 7565).

CHAPTER X

CORPORATION CLAIMS

The question of the formal and material right of corporations to bring action led to a number of differences of opinion which, exceeding in part the provisions of the Treaty of Berlin, concern the discussion and application of general norms of international law.

I. The differences were first negatively limited and confined by the fact that on the basis of a unanimous decision of the Commission the right to bring action was denied to foreign corporations with a branch office in the United States—even in the case of claims originating in such branches.

The question was decided in connection with the claim of foreign insurance companies whose branch establishments in the United States had been admitted to the American insurance business. The claim called for compensation for damage growing out of the sinking of vessels during the war.[1]

On the part of the companies, this claim was among other things motivated by the fact that through their admission to the American insurance business, and their fulfilment of the rules and obligations, they were in a position of equality with the American companies, and were therefore participants of their rights as well as of their duties.

Another argument was derived from the decisions of international tribunals and American courts, wherein it is asserted that a national of a foreign state who has settled permanently in another state, especially for commercial purposes, is to be regarded as a subject of this other state. Special emphasis was placed upon a decision of the noted Amer-

[1] The decision reads: "These causes having come before the Commission for decision, the American Agent and the German Agent having been heard, the causes having been finally submitted and due consideration having been had, the Commission finds that the claimants herein are foreign corporations, associations, partnerships or individuals in whose behalf the United States is not entitled to claim under the Treaty of Berlin, dated August 25, 1921, and that there is no financial obligation under that Treaty on the part of the Government of Germany to pay to the Government of the United States any amount on account of the losses complained." (Decision of September 13, 1924, in re United States on behalf of a number of alien insurance companies, Alliance Assurance Company, Ltd., *et al.*, Docket No. 3909–3937.)

ican jurist Story[2] which held that a foreign national becomes a subject of the country by virtue of permanent domicile there and that thereby he owes this country allegiance.[3]

The German side replied that the natural obligation that a foreign national who wishes to settle in another civilized country is subject to the laws of this other country, and consequently must fulfill also the special existing legal requirements, upon the fulfilment of which the conduct of a given business depends in the case of citizens, in case the foreign national desires to carry on business of that type, does not justify the deductions made by the present claimants. Apart from the fact that the special requirements as applied to insurance companies were laid down, not in the interest of the insurance companies, but in the interest of the insured and are hence not a privilege of such companies, it is not admissible as a matter of principle to make deductions from such domestic conditions with regard to the international status of a company.

Similarly, it was argued, the precedents cited are not applicable. Of the decisions referred to, a part deals with the well-known Anglo-American principle that nationals of a state may become alien enemies by having their domicile in the country of the enemy state during wartime, while the other part deals with cases in which persons have left the country of their nationality and by expatriation have dissolved the bonds to their old home state. If a relation of allegiance to the new home can develop therefrom, that is not a legal condition depending upon the volition of a party, but a legal consequence attached to very definite facts as they do not exist here.

Moreover, the branch establishment of a foreign company which in itself is an integral part of the home office, can not have different nationality from that of the home office.

And in examining the claims, the relation of the capital at work in the United States to the capital invested by the company outside of the United States must be considered.

[2] A member of the Supreme Court of the United States at the time of its eminent chief justice, John Marshall, in the first half of the 19th century.

[3] The *Pizarro*, 2 Wheaton, 277 U.S. (1817), p. 244: "Indeed in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace."

The Commission followed the German argumentation in so far as it opposed the right of the foreign companies to bring action, and took the view that certainly in the sense of the Treaty of Berlin (and of the Treaty of Versailles) such branch establishments can not be regarded as American "nationals."

II. With reference to the *Amerian* corporations themselves, i.e., corporations established under federal laws or laws of one of the forty-eight different states, the American agent took the position that such a corporation is definitely entitled to bring action. In accordance with the American theory, this is expressed in a purely formal way: The corporation has a standing before the Commission; the latter has jurisdiction over the claims of the corporations.

The consequence of this view is that if a claim lacks such standing, the jurisdiction of the Commission can not be motivated by agreement of the two agents, since the Commission is bound and limited in its powers by its charter, i.e., by the international agreement from which it derives its jurisdiction.

This consequence led to difficulties regarding the willingness of the German agent to admit certain corporation claims before the Commission, quite apart from the German position which contested the suability of the parties.

The American agent relied for his argument upon American practice, and particularly upon the definite principle laid down by the Supreme Court (St. Louis and San Francisco Ry. Co. *v.* James, 161 U. S. 545) that it was an indisputable legal presumption that a corporation established in accordance with the laws of one of the American states is composed of citizens of this state.[4]

He referred also to British practice, especially to the decision in the case of Continental Tyre and Rubber Company (Great Britain), Ltd. *v.* Daimler Company, Ltd. 1915 K. B. D. 904, wherein it is held that a corporation is an independent juridical person different from the shareholders, and hence can not be *technically* an English and *materially* a German company.[5]

The American side would admit an exception only in case a corporation was founded by aliens expressly for the purpose of securing the diplomatic protection of the United States, or of evading obligations to their home state arising from their nationality; also in case that and in so far as non-American shareholders of an American corporation have already been compensated otherwise for losses suffered by them.

[4] "It must be regarded . . . as finally settled, by repeated decisions of this court, that, for the purpose of jurisdiction in the Federal courts, a state corporation is deemed to be indisputably composed of citizens of such State."

[5] "It is a different person altogether from the subscribers to the memorandum or the shareholders on the register. . . . It can not be technically an English company and substantially a German company except by the use of inaccurate and misleading language."

The German agent maintained[6] that the tenor of Section 5 of the Knox-Porter Resolution substantially gives only the individual American shareholders *as such* a claim to compensation.

The resolution provides that the German property shall be held until Germany has made adequate provision for the satisfaction of all claims "of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered . . . loss, damage, or injury to their . . . property, directly or indirectly, whether through the ownership of shares of stock in . . . American, or other corporations."

It was agreed that according to the German text, which must be regarded as being of equal value with the English text, the term "person" can mean only natural persons, especially since the "*Wohnsitz*" (domicile) of such persons is mentioned, and that according to German law only a physical person has a "*Wohnsitz*"; furthermore, that according to German conceptions the relation of a juridical person to the state can not be described as a relation of—permanent—"allegiance," and that therefore under the provisions of the Treaty of Berlin the right to bring action is denied to corporations as such.

Nevertheless, as has been noted, the German agent was prepared, for reasons of expediency, to entertain the claims made by the corporations as such, if the decisions possibly rendered in their favor were limited to that part of the shares which was uninterruptedly in the possession of

[6] So far as the suability of American corporations for pressing private debts is concerned (as they come under the treaties of Berlin and Versailles), the German side refrained from opposing, so that this chapter concerns only claims made on an exclusively public law basis against Germany.

The Commission agreed that with regard to rights of an American corporation, in so far as *private law* claims are involved, the German objections derived from the nationality of its shareholders do not hold.

But the legal status seemed very doubtful where such corporations relied for their private law claims upon the public law guarantee of Germany for private debts. Here an eventual application of the principles treated in this chapter in relation to the German Reich itself did not seem out of the question.

This question, discussed in the Commission, was not decided because the German side refrained from pressing its objections.

American citizens, from the time of the loss to the time when the claim was pressed.

In further motivation of the German view, the question of the nationality of juridical persons, disputed in European international law, was discussed and in conjunction therewith, it was shown that the fiction of the juridical person of a corporation, especially according to Anglo-American law, does not exclude a consideration of the persons of the shareholders and their nationality. This assertion was motivated and substantiated by extensive material comprising decisions and measures originating during such times, especially during the World War.

The Commission for its part rejected the German view.

It based its deliberations upon the fact that even if the Knox-Porter Resolution[7] has the meaning given to it by the German side, the question is not decided thereby, since in Article 1 of the Treaty of Berlin and in Section 2 of the resolution, the United States reserved all rights accruing to it from the Treaty of Versailles, and obviously did not wish to prejudice its other rights by the formulation of Section 5 of this resolution.

Hence the Commission resorted to those provisions of the Treaty of Versailles wherein the financial claims against Germany are formulated, and unanimously[8] came to the conclusion, on the basis of the interpretation of Articles 296 and 297 and of the provisions of clause 9 of Annex 1 *sub* Article 244, and of paragraph 4 of Annex 1 to Article 298, that in the sense of the Treaty of Versailles, the word "national" includes also corporations, and that therefore a corporation organized according to American law has standing before the Commission technically and *prima facie*.[9]

[7] Both the American Commissioner and the Umpire interpreted the Knox-Porter Resolution differently from the German Commissioner, in that they held that its text includes corporations.

[8] Cf. the detailed motivation in the vote of the American Commissioner.

[9] For a purely American formulation, to be sure, the term "national" can not be used because in America the term "citizen" is usually employed.

Cf. Convention for Payment of Sums due by France to Citizens of the United States, April 30, 1803.

Claims Convention between the United States and Mexico, July 4, 1868.

Treaty of Washington between the United States and Great Britain, May 8, 1871.

Claims Convention United States-Venezuela, Jan. 19, 1892.

Claims Convention between the United States and Chile, Aug. 7, 1892.

Treaty of Peace between the United States and Spain, Dec. 10, 1898.

With this decision, the Commission was confronted by a series of problems which had not been discussed in the memoranda of the two agents, and could not be treated by the Commission in view of the position of the German agent.

III. First of all, the question arose how this right of the corporation as such was related to the compensation claim granted to the individual shareholder by the Knox-Porter Resolution.[10]

So far as the interpretation of the conditions of the treaty is concerned, such a claim of the individual shareholder and its legal construction could hardly attract a wider interest. But apparently the inclusion, in the treaty, of this special right to bring action is to be ascribed to the general view advocated at the time by the American Government that such claims are entitled to protection as a matter of principle.[11]

That this is actually the American view appears clearly from the provisions of the Claims Convention of September 8, 1923, between the United States and Mexico which in Article I submits also the claims of individual American citizens arising from participation in a "corporation, company, association or partnership" to the decision of the Commission.

The passage reads: "all claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to."

The question, how this loss suffered by an individual by reason of participation in a corporation shall be computed and proved, has apparently been settled neither by judicial decision nor by general principles. The provision of the Convention between the United States and Mexico is limited to the condition: "provided an allotment to the claimant by the corporation, company, association or partner-

Convention between United States, Germany, and Great Britain, relating to the settlement of Samoan claims, Nov. 7, 1899.

Treaty between United States and Certain Powers for the Arbitration of Pecuniary Claims, Jan. 30, 1902.

[10] Sec. 5 provides for claims for losses suffered by persons through the possession of shares of German, Austro-Hungarian, American or other corporations.

[11] Cf. also Chapter VIII.

ship of his proportion of the loss or damage suffered is presented by the claimant to the Commission." But this formulation does not clear the question, especially from the legal point of view. So it is quite conceivable that the damage suffered by a shareholder by reason of losses suffered by the corporation need not be identical with a fraction of the loss suffered by the company, this fraction corresponding to the ratio of his share to the total capital of the company; that, for instance, the extent of the obligations existing for the company may bring it about that the indemnity owing to the company is absorbed in whole or in part by payments to creditors of the company, so that the loss imposed upon the company really does not affect the partners but the creditors of the company. It is also conceivable that despite the loss suffered by the company, the commercial or market value of the individual share is not diminished. Hence it is by no means clear how the individual shareholder will be able to compute his share of loss.

From the internal American point of view, such a claim of the individual shareholder is explained by the close connection of the American shareholder and the corporation with which he is associated. This relation and its effect which penetrate the corporation can not be better illustrated than by reference to the argument of the Supreme Court, Decision in re St. Louis and San Francisco Railway Company *v.* James, 161 U. S. 545. In the decision it is a question of the allegiance of the plaintiff corporation to the state according to the laws of which it is established and wherein it has its seat. But the decision affirms the allegiance not on the basis of this allegiance, but resorts to a long—*ad hoc*—established, irrefutable, legal presumption to the effect that the shareholder of such a corporation must be regarded as a national of the state in question.

If occasionally American law grants the shareholders of a corporation, or a majority of them, the right to press claims belonging to the corporation, this is based upon the same mode of reasoning.

The same is true of the investigation concerning the nationality of a shareholder, such as is required in the questionnaire prepared by the Department of State[12] prior to admitting the claim of a corporation, which will be further discussed below.

[12] Reprinted among the decisions of the Commission.

Cf. also Decision VII, p. 325. There the Umpire holds that the Knox-Porter Resolution quite consciously included American corporations among those in which participation may lead to indirect damage, so as to protect in this way American minority interests in corporations which are externally American but are controlled by an alien minority, because in conjunction with the former custom of the Department of State, the American Government might refuse to press the claims of such corporations.

In such cases American citizens may press their claims through the American Government in their capacity as shareholders, or as participants otherwise.

This reasoning confirms the close connection between the international standing of the corporation and the nationality of its shareholders according to the American interpretation.

But from the point of view of international law, such a special claim of the individual shareholder meets with serious objections. Even if the shareholder of a non-American corporation domiciled abroad is granted a claim for damage inflicted upon him as the result of an act directed against the corporation, the principle governing the intercourse of the nations, to wit, that it must be the nation which has suffered an injustice in the person of a national, becomes merely a meaningless formula. It is replaced by the other principle clearly recognizable in the specifically American development of international law, that not the direction of the reparable act against the person (or thing) of an alien national, but the simple fact of the loss caused to an American by the act is decisive for the international claim.

This theory of loss and its significance is treated in detail in Chapter VIII, to which the reader is referred.

In this place we merely note that this very far-reaching claim to protection is not in harmony, historically and theoretically, with the development of international law thus far.

Early in the history of the United States, the Supreme Court through its eminent Justice Story (mentioned above) had expressed the principle that: "whenever a person is *bonâ fide* domiciled in a particular country, the character of the country irresistibly attaches to him"—Livington *v.* Maryland Insurance Company, 7 Cranch 506 (1813); and in agreement therewith, the same principle was applied to objects with regard to which, again in the words of Justice Story, the court stated: "that the property of a house of trade, established in the enemy's country, is condemnable, as prize, whatever may be the personal domicil of the partners" (in *The Friendschaft*, 4 Wheaton 105).

The principle recognized thereby, that whosoever entrusts his person or his interests to a foreign country also assumes the risk connected therewith, has been utilized in numerous decisions, e.g., Lamar's Ex. *v.* Browne, 92 U. S. 187, 194, and Young *v.* United States, 97 U. S. 39, 60, and particularly in the cases growing out of the Spanish-American War. Thus in re Juragua Iron Company, Ltd. *v.* United States, 212

U. S. 297, the plaintiff, an American corporation incorporated in Pennsylvania but domiciled in Cuba, was deemed "enemy . . . with respect of its property found and then used in that country" (i.e., Cuba).[13]

The same principle was stated as follows by Chancellor Kent in his *Commentaries on American Law* (Vol. 1, p. 74—14th edition):

"The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country."

But it is incompatible with this if for the interests standing behind such a natural or juridical person domiciled abroad, which as such are hardly recognizable in their individuality and nationality, a national protection is claimed in international law because the act causing the damage had economic consequences for such interests belonging to another nationality.

Such a claim for protection must seem all the more doubtful, since it would lead to endless complications if pressed by all nations—a consideration which in the earlier periods of its development seems to have prompted the United States to refuse to espouse such claims.[14]

Before the Commission the claim of the individual shareholder was decided only in the relatively simple form that closed and controlling American groups claimed their share for damages which were suffered, for instance, by companies established under Belgian laws and domiciled in Belgium. Such claims were expressly recognized as coming under Germany's obligation to render compensation, this being the case not only by virtue of the text of the Knox-Porter Resolution but also by virtue of the diplomatic negotiations preceding the conclusion of the Agreement of August 1922. Since, in the cases presented to the Commission, the possibility of overburdening the Belgian companies concerned with debt was not involved, the proportional damage suffered by the American shareholders was simply fixed at a given quota of the total loss.

For the rest the American agent, as we have noted, conceded that wherever the corporation itself was compensated for damage suffered by it, the right of the individual shareholder to compensation is not recognized—a position which solves practically the problem of the simultaneous existence of claims by corporations and their shareholders but by no means removes the juridical difficulties.

[13] Cf. also Herrera *v.* United States, 222 U. S. 558.

[14] Cf. note 14 of Chapter VIII (attitude of the United States in regard to the steamer *Antioquia*).

The question of the material content of these indirect rights of the shareholder of a non-American corporation in its basic formulation is given detailed treatment in the decisions (discussed in Chapter VIII, page 78) United States of America on behalf of Standard Oil Company of New York, Docket 5323, 5434, 5469, volume II, pages 660 *et seq.* of the English text. The ships for which compensation was demanded in those cases, belonged to British companies whose shareholders of a company may have more far-reaching rights than the company itself—page 663—a question which has more general significance from the American point of view. For the protection of the shareholder of an alien company, according to the American theory, is based upon very general considerations of principle.

The question is affirmed, not expressly but implicitly, by the decision of the Umpire in the three cases mentioned.

Doubtless the British companies no longer have claims against Germany, for the British claims are absorbed by the proceedings before the Reparations Commission. Yet the decision assumes that Germany would be liable if it could be proved that the company was so damaged by a German act that American shareholders suffered damage therefrom for which the company did not receive compensation: "if through Germany's act the property of a British corporation has been damaged or destroyed resulting in an American national suffering damage through his ownership of shares therein, then under the Treaty of Berlin Germany is obligated to make compensation to the extent of the damage so suffered by him."

The very far-reaching consequence is that if a ship belonging to a neutral company has been rightfully sunk, so that this neutral company has no claims, the American shareholder is nevertheless entitled to compensation for his share of damage within the limits of the provisions of the treaties of Berlin and Versailles.

Only in its amount does the claim depend upon the amount of the loss suffered by the alien company through the act.

"In determining the damage, if any, suffered by the British corporations . . . the status of these ships must be examined."

IV. Far more important was the discussion of the extent of the material right of the American corporations as such to bring action.

The American Commission contended that every company incorporated under American laws, regardless of the nationality of its shareholders, is substantially entitled to bring action, i.e., for the entire damage suffered by it.

The question whether and to what extent the seat of such a company may influence its nationality was not discussed, since both the American Commissioner and the American agent considered the fact of the establishment of a company under American laws as being alone decisive.

The individual cases presented to the Commission furnished no occasion for discussing this question.

The difference of opinion centered upon another question: to wit, the significance and influence of the nationality of the shareholder upon the nationality of the corporation itself, or in other words, upon the applicability of the principle of control.

Closely connected with this was the difference of opinion on the treatment of non-American minority groups.

With good and important reasons, the theory of control has been impugned and rejected by German writers as the basis for determining the nationality of a juridical person (see Isay, *op. cit.*, and also Klansing Jur. W. 1924, p. 1402). It is also incompatible with the German conception of the legal status of the shareholder, although this does not apply to the legal status of the shareholders of a German limited company.

But if it is true that the laws of the state to which the corporation belongs are decisive in determining its nationality, the theory of control can not be disregarded. For in the United States there are indications in its favor, though recent developments subordinate it to other tendencies.

Thus the United States Department of State has issued general instructions, revised in January 1920, which set up a number of norms for establishing and clarifying the question of the nationality of individuals and corporations. The second section of these instructions deals with the nationality of joint stock companies or corporations as claimants. In the introductory note, it is said that the nationality must be determined and that for this reason the questions then formulated must be answered. And these questions deal with the ratio of the amount of shares held by Americans to the amount in alien possession, and call for the necessary data in the light of the principles applicable to the nationality of the individuals, i.e., both for the time of the origin of the damage and for the time of the filing of the claim with the Department of State.

It follows that the American Government considers the ratio of the shares held by Americans to that of shares held by aliens important (cf. also Borchard, pages 621–2).

According to the view of the American Commissioner, these are purely internal measures not affecting the right of the American Government to afford diplomatic protection to the claim of every corporation incorporate under American laws, so that it is left to the discretion of the American Government to decide for which corporations, and to what extent, claims should be pressed.

But this is opposed by the fact that in the cases presented to the Commission the Government refrained in general from making a preliminary examination of the technical and substantial justification of the claims, and from deciding whether the claims should be pressed or not. The very great number of cases presented to the Commission (over 13,000) rendered such an examination impossible without jeopardizing the purpose of the Commission.

This position opposed by the fact that the text of this instruction does not express such an attitude but on the contrary, by reference to the necessity of determining the nationality of the corporation, justifies the view that—since the nationality of a corporation is incontestably the basis for pressing an international claim as such—the nationality of the shareholder is here essential for the purpose in question. This assumption is all the more justified since we may assume, in view of the position of the American Government, that it is not inclined to limit the claims of its nationals without sufficient cause, and that therefore this control can be explained only by the interpretation, in international law, of the nationality of the corporation as construed by the American Government.[15]

This general attitude of the American Government was bound to have a more important effect since it coincided in general with the principles applied by the other enemy powers during the war.

Hence the German Commissioner took the position [16] that not only under the general American view on the legal requirements of the substantial right of a corporation to bring suit, but especially under the conditions created by the Treaty of Berlin, an American corporation must be denied a claim for compensation if it is controlled by aliens or operated principally with foreign capital.

[15] This reasoning does not clash with the decision of the Supreme Court of January 5, 1925, in re Behn, Meyer & Company, Ltd. *v.* Miller, as alien property custodian. This decision is based upon the text of the Enemy Act and states that the property of a corporation established under British laws, the shares of which were in German hands, could not be sequestered by the American custodian in accordance with the provisions of this law.

[16] For the details we refer to the German vote published among the decisions of the Commission.

A treaty which aims to remove the consequences of a war, and especially to regulate the obligations for compensation developing therefrom, as the treaties of Versailles and Berlin do, can only be judged and interpreted according to the same principles as were applied in the war which preceded.

Special reference was made to Article 297 b, whereby the liquidation of companies controlled by Germans is reserved to the powers beyond the period of war. Recognition of such companies as being American merely because they were incorporated under American laws would in itself be inconsistent, and might finally lead to the compensation, by awards, of German nationals who control American corporations, a thing which was surely not intended by the contracting powers.

In close economic and juridical connection with this view was the further German contention that alien share-minorities must be considered in determining the amount of compensation—decreasing the obligation.

Herein the German side merely reiterated a view which the American Government itself had maintained in connection with the compensation for losses arising from the Spanish-American War. After the Spanish war, the American Government—in the treaty concluded with Spain—had undertaken to compensate American citizens out of its own resources. Before the (exclusively American) Commission, the American agent expressed the view "that only the American stockholders in American corporations could recover." It was not clear why that which seemed justified to the American Government where it was a question of compensating its own nationals, should not hold when the obligation was to be fulfilled from the resources of another state.

To be sure, it was not possible to make a deduction in the case of every corporation claim for every share which at the time in question was not American. But for closed groups of alien shareholders, a deduction could well be made in accordance with this principle. It was the duty of the Commission to determine in individual cases whether and to what extent such deduction was justified.

Hence the German Commissioner, in agreement with the decision rendered at the time by the Commission established on the basis of the Spanish-American treaty, proposed that such cases be reserved for special treatment by the Commission.

Thereby the Germans emphasized the connection, in the case of American corporation claims, between the claim of the corporation and the nature of the capital represented therein. This connection led to

various results, depending upon whether the majority of the capital and the control of the company, respectively, were in American hands or not.

In the former case, according to the German argument, the claim was bound to fail, certainly before the Commission, since such companies, though incorporated under American laws, lacked the substantial right to compensation in respect of the nationality of its shareholders.

In the latter case, American nationality and with it the substantial right to bring suit were present, but the amount of the claim was dependent upon the extent of the participation of American capital.

The obvious thought, emphasized by the American Commissioner, that this construction is bound to fail as a result of the impossibility of computing the share accruing to the alien minority, is answered by the fact that the very assumption of the possibility of such computation is the preliminary condition for the right to bring suit granted to the individual American shareholder in the Treaty of Berlin, and that it is not clear why a computation of damage expressly sanctioned in favor of American citizens and to the prejudice of Germany, can not be applied also when it happens to be in favor of Germany but to the prejudice of non-American, i.e., foreign capital.

Beside this objection, which is conceivable from the principle of computation, there was another objection arising from the construction of the claimant company itself. It was emphasized by the American agent and held that a corporation to which a sum is awarded can not prevent any of its shareholders from deriving the benefits from these values.

In reply thereto, attention was called to the method used by French legislation for removing this objection, and to the fact that this difficulty can not be decisive either in practice or in law, since in the face of it the American Government itself took the position before the Spanish-American Commission which was now taken by the German side.

The Umpire, to whom the decision was left after the two Commissioners had disagreed, refrained from stating his opinion in a formal decision.

But the rules laid down by him and the treatment of the corporation claims as a result thereof, reveal his point of view.

Dissenting from the opinion of the American Commissioner, he approved as a matter of principle the investigation of the substantial interests of the corporation as to the question of how far they possess American nationality.

Dissenting from the view of the German Commissioner, whereby claims of American corporations controlled by non-Americans would be entirely denied, he granted a claim to the American corporation in the amount of the American interest involved, in case it were the interest of an American minority.

If in the investigation there were found determinable foreign minorities in an American corporation with an American majority, the portion of compensation devolving upon it was to be deducted.[17] If on the other hand there were found determinable American minorities in the case of American corporations controlled by aliens, the portion of compensation devolving upon them was to be awarded.

The majorities or minorities existing in a corporation at the time of the origin of the damage, and at the time of the coming into force of the Treaty of Berlin[18] were to be decisive.

The distribution of the amounts thus awarded among those materially entitled thereto was left to the American Government and to the corporations, respectively.

It is remarkable that emphasis was also placed upon the proof of the solvency of the claimant company in this connection. The reason was the beneficiary interest of the American owners of securities, whose right as creditors was involved, in case the resources of the corporation in question were not sufficient to cover the securities. The award of compensation in favor of such American creditors did not become practical. The guiding principles given by the Umpire for the treatment of the corporation claims justify the assumption that his decision would have been in favor of such an award. The purely obligatory relation of such creditor rights to the debtor corporation and to the claims pressed by it would not have opposed because the fact of the economic loss suffered by Americans was always considered decisive.[19]

The reasoning which led the Umpire to these conclusions and which was used in the deliberations of the Commission can not be given in detail. But it may be said that it was based upon the special provisions of the treaties of Versailles and Berlin and in conjunction with the view of the German Commissioner, emphasized the liquidation of the

[17] Thus the Umpire in re United States of America on behalf of the Gans Steamship Line *v.* Germany, Docket No. 6625, Vol. II, pp. 737 *et seq.*, deducted 20% from the compensation in consideration of the German capital represented in the claimant corporation.

[18] Cf. Administrative Decision V.

[19] Cf. Chapter VIII.

war damages as proposed by those provisions. The treatment of similar claims by the British, French and Belgian Governments which in like manner "lifted the veil of the corporations" and considered only the material interests of their own nationals behind the corporations,[20] was not without influence. But the opinion of the Umpire was clearly expressed in connection with his decision in re Henry Cachard and H. Herman Harjes, Executors of the Estate of Medora de Mores *v.* Germany, of October 30, 1925, Docket No. 603.

The decision denies the claim made by American executors of the estate of an American woman, whose heirs were exclusively French nationals, because "the entire beneficial interest in the claim is in French nationals." For its motivation, the decision also relies upon the practice in connection with the corporation claims, and shows that the Umpire approves the principle manifested in these decisions, that in the case of a corporation, the nationality of the interest behind it is decisive, and that he applies it analogously to the nationality of the interest behind the estate which according to American law is technically an independent interest.

"The Mixed Arbitral Tribunals to which France is a party have uniformly held that the nationality of the claim must be determined by the nationality of the beneficiary and have carried this rule to the extent of applying it to corporations, rejecting the juridical theory of the impenetrability of corporations for the purpose of determining the true nationality encased in the corporate shell."

In a note (3) the decisions serving to justify this view are summed up as follows:

> Decision of Franco-German Mixed Arbitral Tribunal in the case of Société du Chemin de fer de Damas-Hamah c. la Compagnie du Chemin de fer de Bagdad, I Dec. M. A. T., pages 401–407. In this case both the claimant and defendant were by their incorporation Turkish. The jurisdiction of the tribunal was challenged by both the defendant company and the German Agent because the claimant company was not French and the defendant company was not German. The tribunal held that as the claimant company was French-controlled and the defendant company was German-controlled the tribunal had jurisdiction. In the course of the opinion it was said: "Moreover, it is thoroughly in accord with the spirit of the Peace Treaty to pay less attention to questions purely formal than to palpable economic realities; consequently, when the nationality of a corporation is to be determined more

[20] Cf. the remarks on the measures of these states in the vote of the German Commissioner.

> weight must be given to the interests represented therein than to the outward appearance which may conceal such interests. In the present case the circumstance that both corporations are described as Ottoman (Turkish) and that their charter seat is in Turkey must be considered as purely formal and not of decisive importance.

We will not be mistaken if, in conjunction with the fact that the rules laid down by the Umpire for the treatment of the corporation claims agree with the principles stated in these decisions, we find in this summary the basis—or one of the bases—for the position taken by the Umpire with regard to this much disputed question.

APPENDIXES

A—Treaty between the United States and Germany[1]

The United States of America and Germany:

Considering that the United States, acting in conjunction with its co-belligerents, entered into an Armistice with Germany on November 11, 1918, in order that a Treaty of Peace might be concluded;

Considering that the Treaty of Versailles was signed on June 28, 1919, and came into force according to the terms of its Article 440, but has not been ratified by the United States;

Considering that the Congress of the United States passed a Joint Resolution, approved by the President July 2, 1921, which reads in part as follows:

> Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.
>
> Section 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which under the Treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.
>
> . . . . .
>
> Section 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date

[1] U. S. Treaty Series, No. 568.

come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America.

Being desirous of restoring the friendly relations existing between the two Nations prior to the outbreak of the war:

Have for that purpose appointed their plenipotentiaries:

The President of the United States of America: ELLIS LORING DRESEL, Commissioner of the United States of America to Germany, and

The President of the German Empire: DR. FRIEDRICH ROSEN, Minister for Foreign Affairs,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities,

reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

ARTICLE II

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section I, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions.

(2) That the United States shall not be bound by the provisions of Part I of that Treaty, nor by any provisions of that Treaty including those mentioned in Paragraph (1) of this Article, which relate to the Covenant of the League of Nations, nor shall the United States be bound by any action taken by the League of Nations, or by the Council or by the Assembly thereof, unless the United States shall expressly give its assent to such action.

(3) That the United States assumes no obligations under or with respect to the provisions of Part II, Part III, Sections 2 to 8 inclusive of Part IV, and Part XIII of that Treaty.

(4) That, while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so.

(5) That the periods of time to which reference is made in Article 440 of the Treaty of Versailles shall run, with respect to any act or election on the part of the United States, from the date of the coming into force of the present Treaty.

ARTICLE III

The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Berlin.

In Witness Whereof, the respective plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in Berlin this twenty-fifth day of August 1921.

(SEAL) ELLIS LORING DRESEL

(SEAL) ROSEN

B—AGREEMENT [1]

The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

The President of the United States of America: ALANSON B. HOUGHTON, the Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany, and

The President of the German Empire: DR. WIRTH, Chancellor of the German Empire,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The commission shall pass upon the following categories of claims which are more particularly defined in the treaty of August 25, 1921, and in the Treaty of Versailles:

1. Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

2. Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association

[1] U. S. Treaty Series, No. 665.

in which American nationals are interested, since July 31, 1914, as a consequence of the war;

3. Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V

Each Government shall pay its own expenses, including compensation of its own commissioner, agent, or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII

The present agreement shall come into force on the date of its signature.

In faith whereof, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August 1922.

(SEAL) ALANSON B. HOUGHTON
(SEAL) WIRTH

C—LIST OF THE MEMORANDA OF THE GERMAN AGENT ON THE TREATMENT OF BASIC QUESTIONS

In re Coronet Phosphate Co., Docket No. 1, on the "real" or "personal" liability of Germany for pre-war debts.

In re Pittsburgh Plate Glass Co., Docket No. 2, on German liability for damages in territory occupied by the German troops.

In re G. A. Carden and B. F. Yoakum, owners of the schooner *Lyman M. Law*, Docket No. 9, on the extent of German liability in the American neutrality zone.

As a supplement thereto the summary "On naval warfare and the law of nations in the recent war."

In re M. Hopkins, Docket No. 4, on liability as a result of the sinking of the *Lusitania*.

In re U. S. Steel Products Co., Docket No. 20, on the liability for war risk insurance premiums.

On the liability for claims of insurance companies for damages resulting from naval warfare.

In re Provident Mutual Life Insurance Co., and others.

On the liability for "war losses" of the life insurance companies (2 memoranda).

On the interpretation of the term "Naval and Military Works or Materials" (Sec. 9 of Annex 1 *sub* Art. 244).

On the appraisal of sunken vessels.

On the right of American corporations to bring action before the Commission (2 memoranda).

On the right of foreign underwriting companies admitted in the United States to bring action.

On the rights of the charterers to receive compensation.

On the right of associations whose members joined the association after the expiration of the time-limit set for filing claims to bring action (Decision VIII).

On the burden of evidence.

On the term "civilian population."

On the interest payable on cash assets. In re Ellen Willcox, Docket No. 13.

On the treatment of German inheritance matters.

In re Paula Mendel, etc., Docket No. 4089, etc.

On the liability of Germany for extraordinary war measures taken by the Allies in German colonies.

In re Arthur E. Hungerford, Docket No. 5950.

The above-named memoranda are only those which have been printed. Numerous others, in part very extensive, on questions of basic importance, are found among the documents of the German agent dealing with the individual cases.

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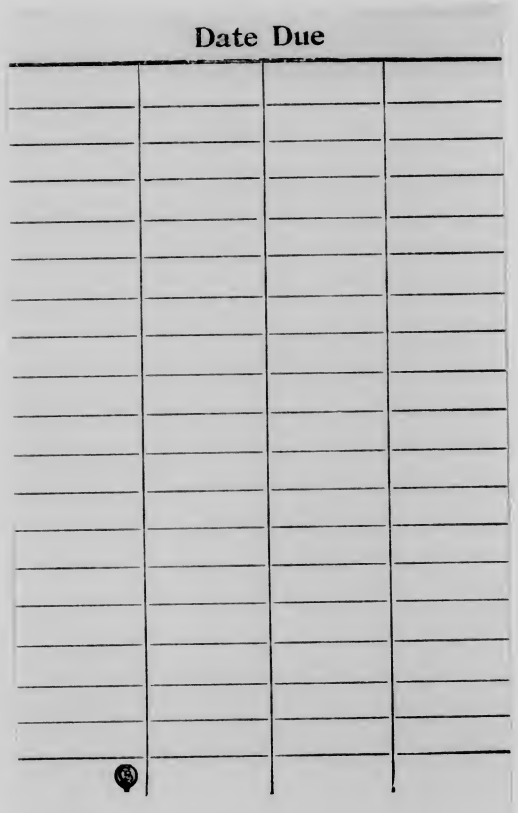

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